SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 17 1961
JAMES R. BROWNING, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 502

WISCONSIN BANKERS ASSOCIATION,
a Wisconsin corporation, and

THE AMERICAN EXCHANGE BANK,
a Wisconsin banking corporation, and

COMMERCIAL STATE BANK,
a Wisconsin banking corporation, and

GRAFTON STATE BANK,
a Wisconsin banking corporation, and

THE BANK OF COMMERCE,
a Wisconsin banking corporation, and

KENOSHA NATIONAL BANK,
a National banking association organized and existing under the laws of the United States of America,

Plaintiffs-Petitioners,

vs.

ALBERT J. ROBERTSON, IRA DIXON, and WILLIAM J. HALLAHAN, comprising the FEDERAL HOME LOAN BANK BOARD, Washington, D. C.,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HARVEY W. PETERS
1308 North Prospect Avenue
Milwaukee 2, Wisconsin
Counsel for Petitioners

Of Counsel:
PERCY W. PHILLIPS
H. STEWART DUNN, Jr.
JOHANNES R. KRAHMER
Southern Building
Washington 5, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes, Regulations and Rulings Involved	4
Statement of the Case	5
Reasons for Granting the Writ	16
I. The Lower Court has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by the United States Supreme Court	16
II. The Lower Court has Decided an Important Question of Federal Law In a Way That is in Conflict With Applicable Decisions of This Court in Three Particulars as Specified in this Petition	20
(1) Where statutory words are plain and unambiguous there is no room for construction	20
(2) Both lower Courts judicially noticed that persons making payments to Federal Savings and Loan Associations under the challenged regulations intend to make deposits, and such intent places the Associations in the banking business. The illegal effect of the transactions cannot be cured by self-serving names and definitions	25
(3) Federal savings and loans were never intended to operate as banks	35
Conclusion	39

Page

Appendix A

Opinion 41

Judgment 49

Order Denying Petition for a Rehearing 50

Appendix B

Statutes 51

Regulations 53

AUTHORITIES CITED

American President Lines v. Mackey, D.C. D.C. 1953, 120 F. Supp. 897 24

American Sugar Refining Co. v. Anderson, D.C. W.D. Kentucky, 20 F. Supp. 55, affirmed C.C.A. 6, 120 F. (2d) 948 33

Ames v. Quimby, 96 U.S. 324, 24 L. Ed. 635 26

Bachrach v. Allen, 239 Mass. 272, 131 N.E. 857 30

Bailey v. Clark, 21 Wall 284, 88 U.S. 651 38

Bank for Savings v. Field, Collector, 3 Wall 495, 70 U.S. 207 ..... 30, 38

C. I. R. v. Clark, C.A. 7, 1953, 202 F. (2d) 94 24

Chesapeake & Ohio Canal Co. v. Hill, 15 Wall 94, 21 L. Ed. 54 26

Commonwealth v. Peoples Five Cents Savings Bank, 5 Allen 428 30

Continental Securities Co. v. Interborough Rapid Transit Co., 165 F. 945 21

Dair v. U. S., 16 Wall 1, 83 U.S. 1 28

Page

DeGanay v. Lederer, 250 U.S. 376, 39 S. Ct. 524.... 22

Forastiere v. Springfield Institute for Savings, 303 Mass. 101, 20 N.E. 2d 950 30

George v. Tate, 102 U.S. 564, 26 L. Ed. 232 26

Guest v. Commissioner, 175 F. 2d 868 (C.A. 5th, 1949) 23

Hamilton National Bank, et al v. American Loan & Trust Company, et al, 66 Neb. 67, 92 N.W. 189....28, 32

Helvering v. City Bank Farmers Trust Co., 296 U.S. 85 (1935), rehearing denied 296 U.S. 664 (1935).. 23

Heryford v. Davis, 102 U.S. 235 26

Home of the Friendless v. Rouse, 8 Wall 430, 75 U.S. 495 28

Huntington v. The National Savings Bank of The District of Columbia, 6 Otto 388, 96 U.S. 777..14, 31, 38

Jeffries v. Olesen, D.C. Cal. 1954, 121 F. Supp. 463.. 24

Karp v. Harlem Business Protective Corporation, 145 Misc. 280, 259 N.Y.S. 921 34

Lewellyn v. Harbison, 31 F. 2d 740 (C.C.A. 3, 1929) cert. den. 280 U.S. 560 (1929) 23

Lewis v. Lynn Institute for Savings, 148 Mass. 235, 19 N.E. 365 29-30

MacLaren v. The State, 141 Wis. 577, 124 N.W. 667.. 32

Marine Bank v. The Fulton County Bank, 2 Wall 252, 69 S. Ct. 252, 17 L. Ed. 785 33

Mercantile National Bank of New York v. New York, 121 U.S. 138, 7 S. Ct. 826 31

Page

Moran v. Cobb, 73 App. D.C. 200, 120 F. (2d) 16, certiorari dismissed 314 U.S. 703, 62 S. Ct. 134, ... 22, 32

Old Colony Trust Co. v. Comm. of Int. Rev., 301 U.S. 379, 57 S. Ct. 813 22

Oulton, George v. The German Savings and Loan Society, 17 Wall 109, 84 U.S. 618 ..... 31, 32

Peugh v. Davis, 96 U.S. 332 26

Prout v. Roby, 15 Wall 471, 21 L. Ed. 58 26

Provident Institution for Savings v. Massachusetts, 6 Wall 611, 73 U.S. 907 38

Rosenblum v. Anglim, D.C. N.D. Calif., 43 F. Supp. 889, affirmed C.C.A. 9, 135 F. (2d) 512 33

Sargent v. Oregon Savings & Loan Co., 73 Ore. 99, 144 Pac. 455 ..... 28, 33

Scammon v. Kimball, 2 Otto 362, 92 U.S. 483 28

Society of Savings v. Coite, 6 Wall 594, 73 U.S. 897 ..... 36, 38

State of Kansas v. Hayes, et al, C.C.A. 10, 62 F. (2d) 597 ..... 23, 32

State v. Manufacturing Co., 40 Minn. 213, 41 N.W. 1020 32

Staunton Industrial Loan Corporation v. Commissioner of Internal Revenue, C.C.A. 4, 120 F. (2d) 930 33

Sterling v. Tantum, 5 Boyce (28 Del.) 409, 94 A. 176 23

Swift & Company v. United States, 105 U.S. 691.... 23

Page

The Samuel E. Spring (1886) 27 Fed. 776 23

United States v. Alger, 152 U.S. 384 23

United States v. Graham, 110 U.S. 219 23

United States v. Gurney, 4 Cranch 333, 2 L. Ed. 638 26

United States v. Wurts, 303 U.S. 414, 58 S. Ct. 637.... 22

Weaver Co., Chester N., 35 B.T.A. 514, reversed in 97 F. (2d) 31 (C.C.A. 9th, 1938) which was reversed 305 U.S. 293 (1938) 23

Wright v. Georgia R.R. & Banking Co., 216 U.S. 420, 30 S. Ct. 242 21

UNITED STATES STATUTES

Federal Deposit Insurance Act, Section 3(1), 64 Stat. 873, U.S.C., Title 12, Section 264(c)(12).... 5

Home Owners' Loan Act of 1933, Section 5(b), 48 Stat. 132, U.S.C., Title 12, Section 1464(b).....4, 7, 20

REGULATIONS

24 C.F.R. 202.9 (1947 Supp.) 8

12 C.F.R. 541.3 (1959 rev.) 8-9

12 C.F.R. 541.4 (1959 rev.) 9

12 C.F.R. 544.1 (1959 rev.) 9

MISCELLANEOUS

Black's Law Dictionary, Fourth Edition, West Publishing Company, 1951 .....29, 37

Page

Federal Home Loan Bank Review, Volume 1, No. 6 (Page 202-207 (March, 1935)) 7

Letter of Federal Home Loan Bank of Greensboro, North Carolina, Volume V, No. 1, issued under date of March 31, 1956 27

Michie of Banks and Banking, Volume 1, Page 10.... 23

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No.

WISCONSIN BANKERS ASSOCIATION,
a Wisconsin corporation, and

THE AMERICAN EXCHANGE BANK,
a Wisconsin banking corporation, and

COMMERCIAL STATE BANK,
a Wisconsin banking corporation, and

GRAFTON STATE BANK,
a Wisconsin banking corporation, and

THE BANK OF COMMERCE,
a Wisconsin banking corporation, and

KENOSHA NATIONAL BANK,
a National banking association organized and existing under the laws of the United States of America,

Plaintiffs-Petitioners,

vs.

ALBERT J. ROBERTSON, IRA DIXON, and WILLIAM J. HALLAHAN, comprising the FEDERAL HOME LOAN BANK BOARD, Washington, D. C.,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Wisconsin Bankers Association, The American Exchange Bank, Commercial State Bank, Grafton State Bank, The Bank of Commerce, and Kenosha Na-

tional Bank, plaintiffs-appellants in the Courts below, pray that a Writ of Certiorari issue to review the judgment herein of the United States Court of Appeals for the District of Columbia Circuit.

Said judgment, affirming the District Court of the United States for the District of Columbia's decision and judgment, was entered on July 13, 1961 and the opinion of the Court was released on July 13, 1961. Thereafter appellants did, on July 24, 1961, file with the United States Court of Appeals for the District of Columbia Circuit a Petition for Rehearing. On August 10, 1961 the Petition for Rehearing was denied by the United States Court of Appeals for the District of Columbia Circuit, and its order of denial was entered August 10, 1961.

OPINIONS BELOW

The Findings of Fact and Opinion of the District Court of the United States for the District of Columbia is reported at 190 F. Supp. 90, and is printed in the record below (Record 80-88). The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix A, infra p. 41) is reported at—— F. 2d —— (U.S.C.A. D.C.), and its Order denying plaintiffs' Petition for Rehearing is reported at —— F. 2d —— (U.S.C.A. D.C.).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was dated and entered July 13, 1961, Petition for Rehearing was filed July 24, 1961 and denied by the Appeals Court Order entered August 10, 1961. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1), and 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

(1) Has the Federal Home Loan Bank Board the power and authority to decree by its regulations that Federal Savings and Loan Associations shall be in the banking business?

(2) In making such decree by regulation, is the Federal Home Loan Bank Board privileged: (a) To ignore restrictions in the savings and loan law enacted by Congress, (b) to cause violation of Federal and State banking laws, and (c) to disregard decisions of the United States Supreme Court and other courts that define the conduct of a banking business?

(3) Can the labels and definitions contained in the regulations of the Federal Home Loan Bank Board render valid an otherwise unauthorized and illegal conduct of banking by Federal Savings and Loan Associations?

(4) Where the law prohibits acceptance of deposits by Federal Savings and Loans without qualification, is the prohibition intended to exclude merely an acceptance of deposits of the type received by commercial banks, or is the prohibition intended to exclude an acceptance of all deposits, including the type received by mutual savings banks?

(5) Where the law prohibits acceptance of deposits by Federal Savings and Loan Associations without qualification, may the regulations prescribe the acceptance of deposits in savings accounts by defining such accounts as capital of the associations?

(6) Where the law prescribes that Federal Savings and Loan Associations shall raise their capital only by payments on such shares as are authorized in their charters, and that no deposits shall be accepted, may the regu-

lations authorize such associations to raise their capital by payments on savings accounts?

(7) Where the regulations of a Federal administrative agency fail to observe the clear language of the law, may persons harmed by the unauthorized regulations obtain a correction thereof by declaratory relief in the Federal Courts, or are such persons required instead to carry their complaint and plea to the Congress?

STATUTES, REGULATIONS AND RULINGS INVOLVED

The pertinent provisions of the statutes involved consist of the Home Owners' Loan Act of 1933, Sections 5(a) and (b), 48 Stat. 132, U.S.C., Title 12, Sections 1464(a) and (b). The text is —

> "1464. Federal Savings and Loan Associations — Organization Authorized
>
> "(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations', and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.
>
> "Capital; deposits; certificates of indebtedness
>
> "(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be

issued except for such borrowed money as may be authorized by regulations of the Board."

Somewhat indirectly involved is the Federal Deposit Insurance Act, Section 3(1), 64 Stat. 873, U.S.C., Title 12, Section 264(c)(12), set forth in Appendix B infra p. 51.

The pertinent provisions of the regulations, rules and charter provisions promulgated by the Federal Home Loan Bank Board for Federal savings and loans, and involved in the proceedings, are also set forth in Appendix B infra p. 53. They are included in form of the "Exhibit 1" to the Joint Pretrial Statement filed by the parties in the District Court (Record 69-73). Said Exhibit contains a summary comparison of the principal changes in regulations and charter provisions of Federal savings and loans, effected by the Federal Home Loan Bank Board in 1949, which changes are challenged as to legality by petitioners.

STATEMENT OF THE CASE

The controversy concerns only the legality and validity of the regulations, rules and charter provisions promulgated and maintained by the Federal Home Loan Bank Board since 1949 for Federal savings and loan operation, and the authority of the Board to issue such regulations.

The petitioners (plaintiffs and appellants in the Courts below) consist of banks that claim, and a banking association whose members claim, that the regulations, rules and charter provisions are illegal and invalid and beyond the authority of the Board to promulgate and maintain. Petitioners claim that the illegal regulations have illegally placed Federal savings and loans in the banking business so as to cause a tortious invasion of petitioners'

property rights as holders of bank charters. Petitioners seek declaratory relief directed at having the regulations, rules and charter provisions amended to conform with the law, and so as to take savings and loans out of the banking business.

The petitioner's charge respecting the illegality of the Federal Home Loan Bank Board's regulations maintained since 1949 for Federal savings and loan operation can be briefly summarized. Petitioners insist that the law requires savings and loans to raise capital by receipt of payments from sale of shares of stock as authorized in their respective charters, which shares may be repurchased. Prior to 1949 the Board's regulations and charter provisions prescribed that savings and loans raise their capital by sale of authorized shares of stock, including $100.00 full-paid income shares, and savings (installment payment) shares. Under such procedure, all payments received were legally dedicated to a purchase of authorized shares. Petitioners also insist that since 1949 the Board has promulgated and maintained entirely different regulations and charter provisions which petitioners charge are illegal. Since 1949 savings and loans have received payments in "savings accounts", and such payments are subject to withdrawal, without there being any purchase of authorized shares, or a purchase of anything. Petitioners contend that the receipt of payments subject to withdrawal is a deposit procedure specifically prohibited under savings and loan law. Petitioners argue that the deposit procedure cannot be validated and rendered legal by any process of the challenged regulations defining "savings accounts" as "capital". Petitioners also insist that there can be no purchase and sale of shares under the condition where the regulations make no reference to shares, and where the language employed can

only cause persons making payments to believe that they are making deposits.

Before institution of the suit in the District Court for the District of Columbia, petitioner, Wisconsin Bankers Association, on its own behalf, and on behalf of the other petitioners herein, had sent to the Federal Home Loan Bank Board by registered mail on January 21, 1958 a "Notice as to Unauthorized Regulations and Petition and Demand for Amendment". A true copy of said Notice was attached to the Complaint filed in the District Court (Record 26-48).

In essential particulars, the petitioners' objections to the regulations and charter provisions can be demonstrated by reference to the law, to the pre-1949 regulations and charter provisions, and to the challenged regulations and charter provisions maintained since 1949.

The law requires:

> "(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board."
>
> (Home Owners' Loan Act of 1933, Section 5(b), 48 Stat. 132, U.S.C., Title 12, Section 1464(b))

*Regulations and Charter provisions prior to 1949:**

*Even though the pre-1949 regulations and charter provisions followed the prescription of the law as to sale of shares as authorized in savings and loan charters, the Home Loan Bank Board warned against employment of the term "savings account":

> "9. Do not refer to a share account as a 'savings account'. Under the statute it is a share account, not a savings account. Such expressions as 'interest on savings' are misleading."
>
> "Federal Home Loan Bank Review", Volume 1, No. 6, Page 207, published March, 1935.

Paragraph 6 of Charter "K" (Record 69) specifically provided for share capital, and for payments upon share capital —

> "Par. 6. — Share capital. — The share capital of the association shall consist of the aggregate of payments upon share accounts and dividends credited thereto less redemption and repurchase payments. * * * Share accounts of $100 or multiples thereof may be known as investment share accounts, consisting of full-paid income shares. All other share accounts shall be known as savings share accounts. Payments upon share accounts shall be called share payments. * * *" (24 C.F.R. 202.9 (1947 Supp.))

Paragraph 12 of Charter "K" (Record 70) provided for a repurchase of shares —

> "Par. 12 — Repurchase. — The association shall have the right to repurchase its share accounts at any time upon application therefor and to pay to the holders thereof the repurchase value thereof. Holders of share accounts shall have the right to file with the association their written applications to repurchase their share accounts, in part or in full, at any time. Upon filing of such written applications to repurchase, the association shall number and file the same in the order received * * *." (24 C.F.R. 202.9 (1947 Supp.))

Paragraph 8 of Charter "K" (Record 73) prohibited an acceptance of deposits by Federal Savings and Loan Associations —

> "* * * The association shall not accept deposits from the public or issue any evidence of indebtedness except for advances. It shall not represent itself as a deposit institution." (24 C.F.R. 202.9 (1947 Supp.))

Regulations and Charter provisions since 1949:

Sections 141.3 and 141.4 of the challenged regulations (Record 69) provide:

> "Section 141.3 — Capital — The term 'capital' means the aggregate of the payments on savings ac-

counts in a Federal association, plus earnings credited thereto, less lawful deductions therefrom. (12 C.F.R 541.3 (1959 rev.))

"Section 141.4 — Savings Account. — The term 'savings account' means the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest." (12 C.F.R. 541.4 (1959 rev.))

Paragraph 6 of the challenged Charter "N" (Record 70) provides:

"Par. 6 — Withdrawals. — The association shall have the right to pay the withdrawal value of its savings accounts at any time upon application therefor and to pay the holders thereof the withdrawal value thereof. Upon receipt of a written request from any holder of a savings account of the association for the withdrawal from such account of all or any part of the withdrawal value thereof, the association shall within 30 days pay the amount requested; * * *" (12 C.F.R. 544.1 (1959 rev.))

On April 3, 1958, the Board by its Resolution No. 11,526 denied the Petition and Demand for Amendment, and by letter dated April 4, 1958, notified plaintiff Wisconsin Bankers Association of such denial, enclosing in said letter a copy of Resolution No. 11,526. Exhibit B to the Complaint is a true copy of the Board's letter of April 4, 1958, and its Resolution No. 11,526 (Record 49-50).

Thereafter, on June 25, 1958 petitioners as plaintiffs in the District Court for the District of Columbia filed a Complaint seeking declaratory relief to effect that certain regulations promulgated on or about March 7, 1949 by the Federal Home Loan Bank Board for Federal savings and loan operation were illegal and unauthorized, that such regulations are without the authority of the Board, and that the Federal Home Loan Bank Board as

administrative officers have acted illegally, that the illegal acts were individual acts and not sovereign acts, that the defendants' acts were ultra vires and therefore could be made the subject of specific relief, since the defendants' illegal acts have resulted in a tortious invasion of petitioners' property rights to exclusively conduct banking in the State of Wisconsin (Record 1-25).

The petitioners in their Complaint invoked the provisions of Sections 1331, 1391, and 2201 of Title 28, and Section 1009 of Title 5, United States Code (the Administrative Procedure Act) (Record 4).

The defendants in their Answer generally sought to uphold the legality, authorization and authority of the regulations, and generally denied the allegations of the Complaint (Record 57-59).

After the filing of the Complaint and Answer, the parties filed a Joint Pretrial Statement (Record 60-74) stipulating as to certain facts, agreeing as to the issues before the District Court for determination, and stipulating and agreeing that the District Court proceedings could be expedited and simplified by the Court first determining two legal issues, identified as follows —

> "(a) The legality of the regulations (and charter provisions) promulgated and maintained by defendants as a Board since on or about March 7, 1949.
>
> "(b) The plaintiffs' legal standing to sue upon the basis of the defendants stipulating for purpose of determining this question that the business of banking may be conducted in Wisconsin by only such organizations, including plaintiffs, as are chartered to operate as banks, and upon the assumption for the purpose of determining this question that the factual allegations of the Complaint are true."

In said Joint Pretrial Statement, the parties agreed that if the District Court should determine that the aforesaid

regulations (and charter provisions) are legal and or that petitioners have no standing to sue, no further trial of the issues would be necessary, and the case should be dismissed (Record 67-68).

Thereafter the District Court entered an Order calling for the submission of the two legal issues as above defined to the Court for consideration, and providing for the filing of Briefs and the hearing of oral argument on said two legal issues (Record 78-79). Consistent with said Order, Briefs were submitted and oral argument held.

Thereafter, on October 27, 1960 the District Court issued its Memorandum Opinion holding that plaintiffs (petitioners here) had standing to sue on basis that the plaintiffs have legal property rights in form of Federal or State charters empowering them to conduct a banking business in the State of Wisconsin, and that plaintiffs were entitled to seek judicial action and legal redress for the protection of such rights. On point of the validity of the regulations and charter changes promulgated by the Federal Home Loan Bank Board, the District Court determined that such regulations and charter changes were within the statutory authority of the Board, and are authorized and legal (Record 80-89). The District Court held that under the rules and regulations challenged by petitioners Federal Savings and Loan Associations were accepting deposits, but that under the deposit procedure, in the words of the District Court:

> the depositor contributes capital to the savings and loan association.
>
> the depositor's sole claim against the associations is as a shareholder.
>
> the depositor in a Federal savings and loan acquires only an ownership or share interest.

Thereafter, the District Court entered an Order and Judgment dismissing the Complaint, with prejudice and costs, but without prejudice to the petitioners' right to appeal the case to the United States Court of Appeals for the District of Columbia (Record 89-90).

Petitioners appealed the Order and Judgment of the District Court to the United States Court of Appeals for the District of Columbia Circuit. In brief and on oral argument, petitioners urged that the authority of the Federal Home Loan Bank to issue regulations is restricted by the terms of the law, and in interpreting the law words should be given ordinary and commonly accepted meanings. Petitioners insisted that the law requires savings and loans to have authorized shares, to raise capital through payments on shares, and to provide for a repurchase of shares. Petitioners urged that the challenged regulations are illegal and invalid by prescribing a deposit procedure instead of transactions involving shares. Petitioners argued that the operations of Federal savings and loans in accepting deposits since 1949 have been identical to the operations of a mutual savings bank, contrary to the precise specifications in, and the intent of, the law enacted by Congress. Petitioners urged that their property rights in form of exclusive franchises to conduct banking in Wisconsin, whether under State or Federal charters, had been harmed and damaged by the Federal savings and loans operating as deposit institutions under the challenged regulations and charter provisions. Petitioners requested the Appeals Court to reverse the Order and Judgment of the District Court, and to instruct the District Court to determine that the challenged rules, regulations and charter provisions were illegal, invalid, and beyond the authority of the Federal Home Loan Bank

Board to issue, so as to continue the petitioners' action in the District Court.

Upon appeal, the respondents as appellees insisted that the challenged regulations, rules and charter provisions were legal, valid and within the power of the Federal Home Loan Bank Board to promulgate and maintain. Respondents urged that the controversy involved merely a question as to the use of terminologies. Respondents insisted that the fact that the word "savings" was used in the new regulations, where the words "shares" or "shareholders" had been used in regulations prior to 1949, had no significance in determining the legality of the regulations.* Respondents also insisted that the regulations as amended in 1949 did not alter the legal status of the shareholder in a savings and loan. Respondents also urged that the District Court had erred in determining that petitioners (as plaintiffs in the District Court) had the right to sue.

The Opinion of the United States Court of Appeals for the District of Columbia Circuit decided that in the absence of a cross appeal the respondents could not attack the District Court holding that petitioners had standing to sue. On matters of the challenged legality of the regulations, rules and charter provisions, the Court of Appeals in its Opinion upheld the District Court, and determined that the regulations were valid and within the authority of the Federal Home Loan Bank Board to promulgate and maintain. The Opinion of the Appeals Court upheld the validity of the challenged regulations on basis of nomenclature, i.e., that the words "savings accounts" had the same meaning as the word "shares" by force of a

*The authorized share procedure as prescribed in the law is not even referred to in the challenged regulations. (Appendix B infra p. 53)

novel statutory definition contained in the very regulations under challenge:

> "* * * Whether this regulation is in accord with Section 5(b) of the Act depends upon the meaning of the term 'savings account.' If it means an account similar to a savings account in a bank with respect to which the bank is debtor to the depositor, the regulation is repugnant to Section 5(b), for two reasons: (a) payments on such savings accounts cannot be payments on 'shares' of capital, as contemplated by the statute, and (b) it violates the provision that 'No deposits shall be accepted . . .' On the other hand, if the term 'savings accounts' was used to mean 'shares' of an association's capital, the regulation is in accord with Section 5(b). (Appendix A infra 44)
>
> "The section of the 1949 regulations which defines capital in terms of payments on savings accounts is immediately followed by a section which defines the term 'savings account' as 'the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest.' It seems quite clear, therefore, that the words 'savings accounts' in the regulation defining 'capital' have the same meaning as the word 'shares' in the statutory provision governing the raising of capital." (Appendix A infra 45)

The Appeals Court did not answer petitioners' contention that a depositor in a mutual savings bank does contribute the wherewithal for a mutual bank doing business, and yet the United States Supreme Court has held that there are no shareholders in case of a mutual savings bank whose charter does not authorize any corporate stock or capital other than deposits which may be made. Citing *Huntington v. The National Savings Bank of The District of Columbia,* 6 Otto 388-395, 96 U.S. 777. Upon appeal petitioners had also urged that mutual savings banks do operate as banks no differently than banks

with capital stock, and that mutual savings banks are required to obtain charters, and otherwise conform to the law provided for mutual savings bank operation.

In a concurring Opinion of the United States Court of Appeals for the District of Columbia Circuit, Circuit Judge Burger commented upon the condition of Federal savings and loans operating as banks:

> "* * * I am constrained to concede that these associations are indeed coming to be regarded by the public much as the equivalent of a bank. For a greater number of people they are a substitute for a bank and in that sense compete directly with banks. * * *" (Appendix A infra 47)

Petitioners filed a Petition for Rehearing with the United States Court of Appeals for the District of Columbia Circuit on the general ground that the Appeals Court Opinion had not decided the legal issue placed before the Court by petitioners' appeal from the District Court decision. The Petition for Rehearing urged that the Appeals Court had the duty to interpret and enforce the law as enacted by Congress; that the attack of petitioners against the regulations was not on point that the regulations failed to prescribe a capital raising procedure, but was instead on point that the nondescript capital raising procedure prescribed in the regulations was in fact a deposit procedure which was prohibited by the law provided for savings and loans; and that the violation of law could not be corrected by terminologies employed, i.e., by defining a savings account as capital. In the Petition for Rehearing, it was emphasized that both the Memorandum Opinion of the District Court, and the concurring Opinion of the Appeals Court readily admitted that Federal savings and loans were functioning as banks under the challenged regulations.

The Petition for Rehearing was denied by the United States Court of Appeals for the District of Columbia Circuit without further Opinion.

REASONS FOR GRANTING THE WRIT

I. The Lower Court Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be Settled, by the United States Supreme Court.

The Opinion of the Circuit Court of Appeals for the District of Columbia in the instant case presents the novel situation of deciding an important legal issue without citing decisions in other cases by way of precedent.*

The Circuit Court for the District of Columbia was unable to cite other decisions by way of precedent, because there are none. The important question of law here presented has not been, but should be, settled by the United States Supreme Court.

This case presents the controlling legal question of whether the Federal Home Loan Bank Board has the power and authority to decree that Federal Savings and Loan Associations shall operate as banks. Further, in enforcing such decree, has the Federal Home Loan Bank Board the power and authority to promulgate and maintain regulations and definitions for Federal Savings and Loan Association operation that:

(1) Ignore the prohibitions in the law provided for savings and loan organizations?

*Both the Opinion and the concurring Opinion each mention one Court decision. The principal Opinion cites a case holding that a share in a Federal Savings and Loan Association is an investment and is not equivalent to a deposit in a bank. The concurring Opinion cites a case which holds that a depositor in a Federal Savings and Loan Association is not a creditor as is a depositor in a bank. Neither of these issues is pertinent in deciding the instant controversy.

(2) Completely disregard Federal and State banking laws that restrict banking to organizations chartered as banks?

(3) Define savings and loan capital raising on a basis completely foreign to decisions of the United States Supreme Court and other courts on point of what constitutes a savings and loan operation, as distinguished from the conduct of a banking business?

This case presents the amazing situation where Federal savings and loans operated in conformance with the law for some fifteen years, only to be transformed into banks since 1949 by force of the challenged regulations, and without there having been a change in the law. Prior to 1949 Federal savings and loans raised their capital by receipt of payments on $100.00 full-paid income shares, and by receipt of payments on savings shares purchased on the installment plan. Such procedure was in accord with the law enacted by Congress. Since 1949, however, Federal savings and loans have operated as a type of mutual savings bank by accepting payments subject to withdrawal. Under such procedure the payments are made into an account labeled "savings account", and defined as "capital".

Petitioners are mid-western banks and the Wisconsin Bankers Association whose members are mid-western banks all operating in the State of Wisconsin. The individual Bank petitioners and the members of the Wisconsin Bankers Association have bank charters granted by Federal and State authorities. Petitioners claim that the challenged regulations have placed Federal Savings and Loan Associations in the banking business in the State of Wisconsin, and that such illegal practice of banking constitutes a tortious invasion of petitioners' property

rights in form of bank charters. Petitioners through this Court action are requesting declaratory relief directed at having the Federal savings and loan regulations amended to conform with the law, and consistent with the status of such regulations prior to 1949.

It is unnecessary to insist that the banking business should be controlled by law, and that only chartered banks should operate as banks, under supervision by administrative agencies provided in the law. The multitude of Federal and State statutes on subject of banking are sufficient evidence of the condition that the privilege to operate as a bank is to be accorded only to those obtaining bank charters. These laws also suggest that the banking business shall be subject to strict regulation by administrative agencies specifically provided for the purpose. In support of their contention that Federal savings and loans are operating as banks without benefit of a banking statute, petitioners need merely cite a comment of Circuit Judge Burger in the concurring Opinion of the United States Court of Appeals for the District of Columbia Circuit in the instant case:

> " * * * I am constrained to concede that these associations are indeed coming to be regarded by the public much as the equivalent of a bank. For a great number of people they are a substitute for a bank and in that sense compete directly with banks. * * * "
> (Appendix A infra 47)

In like manner, the District Court's Opinion freely acknowledged that savings and loans are accepting deposits.

To avoid complete chaos in the field of banking, there must be legal understanding and prescription as to what laws, and which administrative agencies, shall control the conduct of banking. Accordingly, it is a most im-

portant legal issue to determine the extent, if any, to which a Federal administrative agency may decree on its own certain organizations shall conduct a banking business without benefit of a banking statute, and to the harm of chartered banks.

Only the United States Supreme Court can answer this question by a decision in the instant case which involves the legality of the regulations that have placed Federal savings and loans in the banking business.

The Federal savings and loan business is a multi-billion dollar business. This business operated with capital supplied by thrifty citizens. The Memorandum Opinion of the District Court for the District of Columbia in the instant case suggests the probability that the investors in Federal savings and loans may not know the legal effect of their investment:

> "* * * The legal distinction between the status of a depositor in a bank and a depositor in a federal savings and loan association are well defined. It is probable, as plaintiffs suggest, that many depositors in federal savings and loan associations do not recognize their legal status or the distinctions that exist between their savings accounts and a savings account in a state or national banks. * * *" (Record 85)

Such probability presents a corollary question for decision by the United States Supreme Court. Are the savings of the thrifty to be invested in associations provided by Federal law under the condition where the investor does not know what he is acquiring?

Only a decision by the United States Supreme Court in the instant case can answer this corollary question. The instant case involves the legality of the regulations that have caused complete confusion as to the distinction be-

tween what is supposed to be an investment in a savings and loan on the one hand, and a deposit in a bank on the other.

II. The Lower Court Has Decided an Important Question of Federal Law In a Way that is in Conflict with Applicable Decisions of this Court in Three Particulars as Specified in this Petition.

(1) Where statutory words are plain and unambiguous there is no room for construction.

The words of the statute upon which the Federal Home Loan Bank Board must rely for its authority in promulgating rules and regulations for Federal savings and loan operation are plain and unambiguous. On point of capital raising of savings and loans, the Home Owners' Loan Act of 1933. Section 5(b), 48 Stat. 132, U.S.C.A., Title 12, Section 1464(b) provides:

> "(b). Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board."

Considering the plain words of the law, the statute commands Federal savings and loans to authorize shares in their charters, to offer such shares for sale to investors, and to receive payments on such shares, which payments would then constitute the capital of the Associations. The statute also authorizes provisions for repurchase of shares by retirement.

The best evidence on point that the statute is stated in plain and unambiguous language, and readily understood,

is afforded by fact that for some 15 years prior to 1949 the Board consistently promulgated and maintained one set of rules, regulations and charter provisions for savings and loan operation, only to promulgate and maintain an entirely different set of rules, regulations and charter provisions since 1949.

The Circuit Court of Appeals for the District of Columbia failed to heed the ordinary and commonly accepted meanings of the words used in the statute. The term "shares" could only refer to capital stock of a corporation where there is further reference to "authorized in their charter". "Share" is one of the whole number of equal parts into which capital stock of a corporation may be divided. *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 F. 945. Certainly the Appeals Court should not have concluded that the law's requirement as to "shares as are authorized in their charter" was extraneous language. "Shares" represent a subscriber's contribution to capital stock, and measure his interest in the company. *Wright v. Georgia R. R. & Banking Co.*, 216 U.S. 420, 30 S. Ct. 242, 54 L. Ed. 544. The Opinion of the Appeals Court upheld the validity of the challenged regulations on basis of terminologies, and decided that the words "savings accounts" had the same meaning as the word "shares" by force of a novel statutory definition contained in the very regulations under challenge:

> "* * * Whether this regulation is in accord with Section 5(b) of the Act depends upon the meaning of the term 'savings account.' If it means an account similar to a savings account in a bank with respect to which the bank is debtor to the depositor, the regulation is repugnant to Section 5(b), for two reasons: (a) payments on such savings accounts cannot be pay-

ments on 'shares' of capital, as contemplated by the statute, and (b) it violates the provision that 'No deposits shall be accepted. . . .' On the other hand, if the term 'savings accounts' was used to mean 'shares' of an association's capital, the regulation is in accord with Section 5(b).

"The section of the 1949 regulations which defines capital in terms of payments on savings accounts is immediately followed by a section which defines the term 'savings account' as 'the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest.' It seems quite clear, therefore, that the words 'savings accounts' in the regulation defining 'capital' have the same meaning as the word 'shares' in the statutory provision governing the raising of capital." (Appendix A infra 44-45)

This procedure of the District of Columbia Court of Appeals conflicts with a prior determination of said Court so well stated in *Moran v. Cobb*, 73 App. D.C. 200, 120 F.(2d) 16 at 22, certiorari dismissed 62 S. Ct. 134, 314, U.S. 703, 86 L. Ed. 562:

"A well recognized principle of statutory interpretation is that, in the absence of some dominant reason to the contrary, a word used in a statute should be given its ordinary and commonly accepted meaning. * * *."

(Citing *United States v. Wurts*, 303 U.S. 414, 417, 58 S. Ct. 637, 82 L. Ed. 932; *Old Colony Trust Co. v. Comm. of Int. Rev.*, 301 U.S. 379, 383, 57 S. Ct. 813, 81 L. Ed. 1169; *DeGanay v. Lederer*, 250 U.S. 376, 381, 39 S. Ct. 524, 63 L. Ed. 1042)

Where statutory words are plain and unambiguous, there is not room for construction, and nothing is left for

the Court but to give them their full force and effect. *The Samuel E. Spring* (1886) 27 Fed. 776.

While it is true that the construction given to a statute by those charged with the duty of executing it will be given greater weight by the courts, if the true construction be doubtful, this rule has no application where the statute is not ambiguous, or where it will not bear the interpretation put upon it by the executive officers. *Swift & Company v. United States*, 105 U.S. 691, 695; *United States v. Graham*, 110 U.S. 219; *United States v. Alger*, 152 U.S. 384, 397.

It is improper to resort to legislative or judicial history where the statute is clear. *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1935), rehearing denied 296 U.S. 664 (1935); *Chester N. Weaver Co.*, 35 B.T.A. 514, reversed in 97 F. (2d) 31 (C.C.A. 9th, 1938) which was reversed 305 U.S. 293 (1938); *Lewellyn v. Harbison*, 31 F. (2d) 740 (C.C.A. 3, 1929), cert. den. 280 U.S. 560 (1929). The spurious use of legislative history cannot be permitted to swallow the legislation itself. *Guest v. Commissioner*, 175 F. (2d) 868 (C.A. 5th, 1949).

The intention of the legislature must be gathered from the language of the particular statute, and not from what the court thinks must have been intended in view of then existing conditions and the general policy of the law. *State of Kansas v. Hayes, et al*, C.C.A. 10, 62 F. (2d) 597, 600, citing *Sterling v. Tantum*, 5 Boyce (28 Del.) 409, 94 A. 176, 182.

The power of administrative officers or of a board to administer Federal Statutes, and to prescribe rules and regulations to that end, is not the power to make law, but the power to adopt regulations to carry into effect the

will of Congress as expressed by statute. *C. I. R. v. Clark*, C.A. 7, 1953, 202 F. (2d) 94. The rule-making power of an administrative official is not the power to legislate, but is merely the power to fill in details within limitations of a statute. *American President Lines v. Mackey*, D.C. D.C. 1953, 120 F. Supp. 897. Administrative determinations must have a basis in law, and must be within the granted authority. *Jeffries v. Olesen*, D.C. Cal. 1954, 121 F. Supp. 463.

The Court of Appeals erred in failing to decide that the regulations promulgated and maintained by the Federal Home Loan Bank Board for Federal savings and loans since 1949 are invalid and contrary to law. If the intent of the legislation had been gathered from the clear language of the statute, and if the plain and unambiguous words of the law had been taken by the Court at face value, the Appeals Court was required to conclude that Federal savings and loans can only raise capital by sale of shares as are authorized in their charters, and are entitled to provide for a repurchase of such shares. The Appeals Court erred in upholding the 1949 regulations that eliminated transactions in "shares" by substituting "savings accounts" for "shares", and by substituting "withdrawal" of, for "repurchase" of, funds invested, and by other substitutions. The Appeals Court erred in holding that the challenged regulations could be rendered valid by mere reliance upon terminologies employed, and by the Court accepting the novel definition for "savings accounts" as meaning a share interest. As explained in another portion of this Petition, the decision of the Court of Appeals is also opposed to decisions of the United States Supreme Court of many years' standing, which decisions characterize savings and build-

ing associations, and distinguish such associations from banks of deposit.

It is only by the United States Supreme Court granting this Petition, and hearing the controversy, that the error of the Appeals Court for the District of Columbia, in deciding this important question of Federal law, can be corrected. By a decision of this Court, the controversy can be decided on basis of the correct legal principle that the plain and unambiguous terms of the applicable savings and loan law must be reflected in the regulations, or the regulations are invalid.

(2) Both lower Courts judicially noticed that persons making payments to Federal Savings and Loan Associations under the challenged regulations intend to make deposits, and such intent places the Associations in the banking business. The illegal effect of the transactions cannot be cured by self-serving names and definitions.

The District Court in its Memorandum Opinion described the receipt of payments by Federal savings and loans under the challenged regulations as a receipt of deposits. The District Court, however, distinguished between a deposit in a bank and a deposit in a Federal Savings and Loan Association, but not without acknowledging that "It is probable, as plaintiffs suggest, that many depositors in federal savings and loan associations do not recognize their legal status or the distinctions that exist between their savings account and a savings account in a state or national bank". (Record 85) The Appeals Court, on the other hand, concluded that the regulations were valid simply because the regulations define "savings accounts" as "capital". Even as the District Court had commented upon the probability that many depositors in Federal savings and loans do not

recognize their legal status, the concurring Opinion of the Appeals Court acknowledged that these associations are indeed coming to be regarded by the public much as the equivalent of a bank, and for a great number of people they are a substitute for a bank.

Petitioners respectfully assert that both of the lower Courts based their determination upon form, names and definitions, without analyzing the true legal effect of receipt of payments by Federal savings and loans. The ready acknowledgment in both Opinions that the public does not understand the savings and loan procedures should emphasize that the names, labels and definitions in the regulations do not reflect the intent of the persons making the payments. Certainly the intent of persons making payments to savings and loans is a major element in determining legal effect of the payment procedure.

The true construction of a contract depends upon the ruiing intention of the parties, and is not to be found in the name given to the instrument or the form of the instrument. *Heryford v. Davis*, 102 U.S. 235. The courts are required to look beyond the terms of the instrument to the real transaction. *Peugh v. Davis*, 96 U.S. 332. The intention of the parties is controlling in interpreting any contract. *George v. Tate*, 102 U.S. 564, 26 L. Ed. 232; *United States v. Gurney*, 4 Cranch 333, 2 L. Ed. 638; *Ames v. Quimby*, 96 U.S. 324, 24 L. Ed. 635; *Chesapeake & Ohio Canal Co. v. Hill*, 15 Mass 94, 21 L. Ed. 54; *Prout v. Roby*, 15 Wall 471, 21 L. Ed. 58.

Both the District Court in its Memorandum Opinion, and the concurring Opinion of the Appeals Court, strongly implied, if such Opinions did not in fact directly state, that persons making payments to Federal Savings and Loan Associations are presuming that they are mak-

ing deposits in the "savings accounts" under the challenged regulations and charter provisions. The understanding of persons making payments was acknowledged by none other than Dr. William H. Husband, General Manager of the Federal Savings and Loan Insurance Corporation, in course of an address (as published in the letter of the Federal Home Loan Bank of Greensboro, North Carolina, Volume V, No. 1, issued under date of March 31, 1956) that includes the following pertinent language*:

> "Quite generally, savings and loan associations have created the impression that they fully expect to pay withdrawals on demand. Often outright written or oral statements are made to this effect, and, even more frequently, there is reliance upon tacit understanding. * * *
>
> "Viewed strictly in this light, there can be little doubt about the need for reasonable liquidity if associations are to live up to their obligations to the saving public. The alternative, of course, is to advertise the rights of associations to prorate funds in the event of emergency. However, when the cold realities of this policy are considered, it must be clear that its effects would probably be detrimental to the best interests of the savings and loan business. * * * "

Note Dr. Husband's emphasis on point of paying "withdrawals on demand", without even a scintilla of reference to "shares", "payments on shares", "repurchase of shares", or, for that matter, without even any reference to "capital", however described, or defined in the regulations.

---

*The quoted statement is included in "Petition and Demand for Amendment" attached as an Exhibit to the Complaint in the proceeding.

The understanding of persons making the payments to savings and loans under the challenged regulations cannot be dismissed as unimportant. These persons are parties to these transactions, and their intent in making payments is important. The courts should not allow a party to induce another with whom he is contracting to pursue a line of conduct and to later deny the act. *Dair v. U. S.,* 16 Wall 1, 83 U.S. 1, 21 L. Ed. 491. The petitioners are challenging the charters provided by the Board since 1949 for savings and loan operation. The language of such charters must be construed most strongly against the parties using them. *Hamilton National Bank, et al v. American Loan & Trust Company, et al,* 66 Neb. 67, 92 N.W. 189; *Home of The Friendless v. Rouse,* 8 Wall 430, 75 U.S. 495, 19 L. Ed. 495.

The legal status of a deposit is not determined by names or definitions. The agreement to refund a deposit may be express or implied; and, if it is express, it may be to refund with or without interest, according to the terms of the agreement. *Scammon v. Kimball,* 2 Otto 362-371, 92 U.S. 483. One can discern no difference between a mere deposit of money subject to the right to withdrawal, and the case where money is deposited subject to be withdrawn upon the surrender of an instrument, whatever may be its character. *Sargent v. Oregon Savings & Loan Co.,* 73 Ore. 99, 144 Pac. 455.

Irrespective of the recognized intent of the persons making payments to Federal Savings and Loan Associations, both the District Court and the Appeals Court upheld the challenged regulations on the ground that persons making payments to these associations were not in the legal status of a creditor as in case of a person making a deposit in a bank. Before the Appeals Court petitioners stressed the fact that depositors in a mutual

savings bank were not creditors, and this did not prevent deposits in a mutual savings bank from being deposits, and it did not prevent a mutual savings bank from operating as a savings bank.

A depositor is not required to be a creditor. The term "deposit" is defined in Black's Law Dictionary, Fourth Edition, West Publishing Company, 1951, Page 527:

> "The act of placing or lodging money in the custody of a bank or banker, for safety or convenience to be withdrawn at the will of the depositor, or under rules and regulations agreed on. Also, the money so deposited, or the credit which the depositor receives for it. State Banking Board v. James, Tex. Civ. App., 264 S.W. 145, 149."

> "'Deposit,' according to its commonly accepted and generally understood meaning among bankers and by the public, includes not only deposits payable on demand and subject to check, but deposits not subject to check, for which certificates, whether interest-bearing or not, may be issued, payable on demand, or on certain notice, or at a fixed future time. Jones v. O'Brien, 58 S.D. 213, 235 N.W. 654, 659."

As hereinbefore emphasized depositors in mutual savings banks are not creditors. All the funds and investments of a mutual savings bank are held exclusively for the benefit and security of the depositors. This idea is the cornerstone of the whole system. There is no absolute promise to repay any depositor the full amount of his deposit, at all events. The promise is, in effect, to pay each depositor in full with his dividends, provided the assets are sufficient; and, if they are not sufficient, then to pay to each one his proportionate share. *Lewis v. Lynn*

Institute for Savings, 148 Mass. 235, 19 N.E. 365. The Court in said case stated —

> " * * * The remark in *Reed v. Bank,* 130 Mass. 443, 446, that a depositor in a savings bank becomes a creditor of that bank, is correct; but there was then no occasion to consider what is now determined, namely, that the promise of the savings bank is not an absolute promise to pay in full, at all events."

In *Bachrach v. Allen,* 239 Mass. 272, 131 N.E. 857, the Massachusetts Supreme Court more specifically described the relationship between a mutual savings bank and a depositor, viz:

> "In our savings banks, where all the funds and investments are held solely for the benefit of the depositors, the legal relationship between bank and depositor is substantially that of trustee and cestui que trust. Greenfield Savings Bank v. Abercrombie, 211 Mass. 252, 97 N.E. 897, 39 LRA (N.S.) 173. Ann. Cas. 1913 B 420. The depositors all have a common interest in the invested funds and each is entitled to his proportionate share of the profits. * * * "

A deposit in a mutual savings bank is in some respects an interest in a trust fund rather than an absolute debt. *Forastiere v. Springfield Institute for Savings,* 303 Mass. 101, 20 N.E. 2d 950, citing *Commonwealth v. Peoples Five Cents Savings Bank,* 5 Allen 428, 434; and others.

In *Bank for Savings v. Field, Collector,* 3 Wall 495-514, 70 U.S. 207, the United States Supreme Court held that some savings banks have no capital —

> "Savings banks having no capital are not included in that provision; * * * Such savings banks having neither capital nor circulation, did not fall within the words of either of those clauses and, * * * But

those banks, as banks of deposit, did fall directly within the words of the first clause of the section * * *."

Savings banks are nevertheless banks. In *George Oulton v. The German Savings and Loan Society,* 17 Wall 109-123, 84 U.S. 618, the Supreme Court held that an institution exercising only the function of accepting deposits is a bank in the strictest commercial sense. In the *Oulton* case, the savings bank did have capital stock, but such capital stock was not obtained by any deposit procedure.

In *Mercantile National Bank of New York v. New York,* 121 U.S. 138, 7 S. Ct. 826, 30 L. Ed. 895, the United States Supreme Court commenting upon savings banks described them as banks of deposit for the accumulation of small savings belonging to the industrious and thrifty.

In *Huntington v. The National Savings Bank of The District of Columbia,* 6 Otto 388-395, 96 U.S. 777, the United States Supreme Court held there are no shareholders in case of a mutual savings bank whose charter does not authorize any corporate stock or capital other than the deposits which may be made.

The acceptance of deposits as a regular business constitutes banking no matter what the name applied to the institution conducting the business. To determine the actual character of a business, one must look to the object of its formation and the nature of its business as stated in the Articles themselves. It cannot be made one kind of a corporation merely by labeling it as such if its declared objectives and purpose show it to be something else. Notwithstanding the fact that a corporation may be named a "trust company", instead of a "banking in-

stitution", as long as it had and exercised banking powers, and claimed for itself banking privileges, it is a bank by whatever name it may be called. *Hamliton National Bank, et al v. American Loan & Trust Company, et al,* 66 Neb. 67, 92 N.W. 189; *State v. Manufacturing Co.,* 40 Minn. 213, 41 N.W. 1020, 3 L.R.A. 510.

Banking includes receipt of deposits, making of loans and issuance of notes as a circulating currency. Modern bankers frequently exercise any two or even all three of those functions, but it is still true that an institution prohibited from exercising any more than one of those functions is a bank in the strictest commercial sense. *State of Kansas v. Hayes, et al,* C.C.A. 10, 62 F. (2d) 597, 600.

Where a department store received deposits, and permitted deposits to be withdrawn on demand, without such deposits being used to purchase merchandise, the department sore conducted a general deposit business, and was illegally engaged in banking. *MacLaren v. The State,* 141 Wis. 577, 124 N.W. 667.

The essential element in the definition of a bank is:

> "an institution which receives and pays out deposits"

Moran v. Cobb, 73 App. D.C. 200, 120 F. 2d 16, 22, certiorari dismissed 62 S. Ct. 134, 314 U.S. 703, 86 L. Ed. 562.

In *George Oulton v. The German Savings and Loan Society,* 17 Wall 109-123, 84 U.S. 618, the Court stated —

> "Strictly speaking, the term bank implies a place for a deposit of money, as that is the most obvious purpose of such an institution."

To the same effect, *Marine Bank v. The Fulton County Bank*, 2 Wall 252-258, 69 S. Ct. 252, 17 L. Ed. 785.

In *American Sugar Refining Co. v. Anderson*, D.C. W.D. Kentucky, 20 F. Supp. 55, affirmed C.C.A. 6, 120 F. (2d) 948, it was held that the business of banking relates to dealing in money by receiving deposits. In *Staunton Industrial Loan Corporation v. Commissioner of Internal Revenue*, C.C.A. 4, 120 F. (2d) 930, the court held that one of the chief functions of a bank involves the receipt of deposits from the general public. In such case, the Court acknowledged that the definitions of a bank differ in their terms, but it will be found that there is at least one element appearing in each and every one of them — a bank is an institution which receives and pays out deposits. The Court concluded that while the banking business involves more than the accepting and paying out of deposits, an institution which exercises only these two functions may be carrying on the banking business, if these things are done as a regular business.

The *Staunton Industrial Loan Corporation* case was followed in *Rosenblum v. Anglim*, D.C. N.D. Calif. 43 F. Supp. 889. Upon affirmance, *Rosenblum v. Anglim*, C.C.A. 9, 135 F. (2d) 512, the Court of Appeals held that a person carrying on the business of receiving deposits may be said to carry on the banking business.

Michie of Banks and Banking, Vol. I, Page 10, states that the business of banking as defined by law and custom consists in "receiving deposits payable on demand * * * ".

In *Sargent v. Oregon Savings & Loan Co.*, 73 Ore. 99, 144 Pac. 455, the Court determined that the central purpose of defendant's business was not to engage in a

general banking business, but concluded that it was not required that defendant transact the various kinds of business enumerated in the statute in order to be a bank, the exercise of a single function falling within the statutory definition being sufficient. The Court refused to find a difference between the case of a deposit left subject to check, and the case where money deposited was subject to be withdrawn upon the surrender of an instrument, whatever may be its character.

Petitioners would insist that the Federal savings and loan procedures suggest reference to a comment made by a New York Court —

> "One senses it was not by mere chance that the features of the defendant's transactions strongly resemble a banking business. The methods, terms, rules, and conditions deliberately adopted and practiced by the defendant plainly identify its activities as a banking business."

Karp v. Harlem Business Protective Corporation, 145 Misc. 280, 259 N.Y.S. 921. In said case, the Court concluded "What the law prohibits, a court of law should not permit."

In the *Karp* case, the Court also concluded that where the activities of a corporation constitute an illegal conduct of the banking business, the Court cannot separate a single entire banking transaction, into part valid and part invalid, but the entire transaction must be condemned.

It is only by the United States Supreme Court granting this Petition, and hearing the controversy, that the error of the Appeals Court for the District of Columbia can be corrected on point that the regulation inspired intent of the persons making payments to savings and loans

will be respected, and the legal effect of such payments will be recognized as establishing a deposit procedure. Upon such legal determination, there can only result the further determination that Federal Savings and Loan Associations are engaged in a banking business under the challenged regulations and charter provisions, contrary to the law, and to the damage and harm of petitioners legally chartered to operate as banks. By a decision of this Court the issue can be completely and finally resolved.

(3) Federal savings and loans were never intended to operate as banks.

Had Congress intended Federal Savings and Loan Associations to operate as banks, such intent would have been reflected in the law. Congress could have expressed such intent by amending the Federal banking statutes, or by having the savings and loan law indicate that these associations were to operate as banks. Congress specifically indicated a contrary intent by specifying a capital raising restricted to sale of shares of stock, and by prohibiting the acceptance of deposits, so as to completely remove any possibility that these associations could in any way operate as banks, or be confused with banks by persons investing in the associations. These restrictions of the law have been covered in prior portions of this Petition. Congress, however, went beyond the point of denying to these associations any bank functions. Congress established in the law the legal character of these associations. This is provided in the law in form of a directive to the Board that in providing for organization and operation of Federal Savings and Loan Associations the Board was to give:

> " * * * primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

Specifically, Congress showed clear intent in the law that these associations were to operate as savings (building) and loan associations.

The difference between building and loan, or savings and loan, associations and banks has always been clearly understood and defined until promulgation of the 1949 regulations and charter provisions here challenged. The United States Supreme Court has specifically recognized the difference. In *Society for Savings v. Coite*, 6 Wall 594-611, 73 U.S. 897, the United States Supreme Court referred to institutions called savings and building associations, as to which the Court stated —

> " * * * They are stock associations of a novel and peculiar character, organized under a general law, and are quite distinct from savings banks and societies for savings, which are merely banks of deposit and loan, having no stock, * * *."

In that case the United States Supreme Court drew a distinction between savings and building associations and mutual savings banks by emphasizing that one group consisted of stock associations while the other (savings banks) were banks of deposit. This very distinction was recognized by Congress in the savings and loan law by requiring that Federal savings and loans raise capital only by sale of (receiving payments on) authorized shares, and by prohibiting these associations from accepting deposits.

This is not a mere question of names and terminologies, but deals with the very foundation of the savings and loan operation as distinguished from banking. Stated simply, savings and loans are supposed to raise capital by sale of shares of stock. They are not supposed to obtain their capital by a short-term supply of funds, and

it does not matter if such funds are borrowed, or obtained through withdrawable payments on savings accounts defined as capital.

The savings and loan law prescribes that capital be raised by payments. A payment cannot be a deposit subject to withdrawal. This was recognized in the regulations and charter provisions prior to 1949 wherein it was specifically required that any savings and loan investor desiring to withdraw his funds had to accomplish a repurchase of his shares of stock. The purchase and repurchase are absolutely required in order for the term "payment" as used in the law to have any meaning whatsoever. The word "payment" is defined (Black's Law Dictionary, Fourth Edition, West Publishing Company, 1951, Page 1285) as follows

* * * *

> "A discharge of an obligation or debt, and part payment, if accepted, is a discharge pro tanto. Hattrem v. Burdick, 138 Or. 660, 6 P. 2d 18, 19.
>
> "Though 'payment' in a broad sense includes money or anything else of value which the creditor accepts in satisfaction of his debt, it means in its restricted sense full satisfaction paid by money and not by exchange or compromise or by an accord and satisfaction. Roach v. McDonald, 187 Ala. 64, 65 So. 823. 'Payment' is generally understood to mean a discharge by a compliance with the terms of the obligation or its equivalent, while in an 'accord and satisfaction' the discharge is effected by the performance of terms other than those originally agreed on. Barcus v. J. I. Case Threshing Mach. Co., Tex. Civ. App., 197 S.W. 478, 480. * * *"

What obligation can a payment discharge under the condition where it is subject to withdrawal?

The Appeals Court sought to correct for the nonexistence of shares of stock by relying upon the self-

serving definition in the regulations to effect that "savings accounts" are "capital". Even disregarding the factor of intent of persons making savings and loan deposits, capital is not something obtained on a deposit and withdrawal basis. The term capital has a settled meaning; it applies only to the property or means contributed by the stockholders as the fund or basis for the business or enterprise for which the corporation or association was formed. The term capital does not embrace temporary loans, though the moneys borrowed be directly appropriated in the business or undertakings. As to investors in a business, the term capital has substantially the same import; it then means property taken from other investments and uses and set apart for and invested in the business. The term capital does not embrace temporary loans. *Bailey v. Clark*, 21 Wall 284-288, 88 U.S. 651.

It is untenable that a Federal agency should by regulations seek to legally define a deposit subject to withdrawal at any time as a payment made in course of purchase of a share of stock, or any share of capital, however labeled. Deposits are sums received from depositors without regard to the nature of the funds. They are not capital stock in any sense, nor are they even investments. *Provident Institution for Savings v. Massachusetts*, 6 Wall 611-632, 73 U.S. 907. Deposits are not capital stock in any point of view. *Society for Savings v. Coite*, 6 Wall 594-611, 73 U.S. 897, citing *Bank for Savings v. Field, Collector*, 3 Wall 495-514, 70 U.S. 207. In *Huntington v. The National Savings Bank of The District of Columbia*, 6 Otto 388-395, 96 U.S. 777, the United States Supreme Court held there are no shareholders in case of a mutual savings bank whose charter does not authorize any corporate stock or capital other than the deposits which may be made.

It is only by the United States Supreme Court granting this Petition, and hearing the controversy, that the error of the Appeals Court for the District of Columbia can be corrected on point that the legal character of Federal Savings and Loan Associations (as distinguished from banks) is required to be observed. This legal character is established in the savings and loan statute by the directive to the Board therein contained. It is further established in court decisions, including particularly the decisions of the United States Supreme Court, which clearly define savings and building associations as stock associations, and which repeatedly emphasize that deposits are not capital stock in any sense.

CONCLUSION

The Circuit Court of Appeals for the District of Columbia Circuit has erroneously decided an issue of law of extremely broad impact involving the continued conduct of the multi-billion dollar Federal Savings and Loan Association business. The decision involves a legal issue never before this Court on point of the authority of a Federal agency to place corporations in the banking business without benefit of law through the promulgation of regulations and charter provisions, and so as to tortiously damage the bank charters of petitioners. The decision of the Appeals Court conflicts in several respects with decisions of the United States Supreme Court, including a failure to observe the rule that where statutory words are plain and unambiguous there is no room for construction; the failure to observe the rule that the legal effect of a transaction is dependent upon the intent of the parties to the transaction; and the failure to respect the legal character of Federal Savings and Loan Asso-

ciations as defined in the law, and as distinguished from banks.

Review by the United States Supreme Court is necessary and warranted. The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HARVEY W. PETERS
1308 North Prospect Avenue
Milwaukee 2, Wisconsin
Counsel for Petitioners

Date: October 14, 1961.

Of Counsel:
PERCY W. PHILLIPS
H. STEWART DUNN, Jr.
JOHANNES R. KRAHMER

APPENDIX A

OPINION

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,212

WISCONSIN BANKERS ASSOCIATION, ET AL., APPELLANTS

v.

ALBERT J. ROBERTSON, ET AL., COMPRISING THE FEDERAL HOME LOAN BANK BOARD, APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided July 13, 1961

Mr. Harvey W. Peters, with whom *Messrs. Percy W. Phillips, H. Stewart Dunn, Jr.*, and *Johannes R. Krahmer* were on the brief, for appellants.

Mr. Albion W. Fenderson, Attorney, Federal Home Loan Bank Board, of the bar of the Supreme Court of Maine, *pro hac vice*, by special leave of court, with whom *Messrs. Thomas H. Creighton, Jr.*, General Counsel, Federal Home Loan Bank Board, *Ray E. Dougherty*, *Max Wilfand*, and *Paul E. McGraw*, Attorneys, Federal Home Loan Bank Board, were on the brief, for appellees.

Before WILBUR K. MILLER, *Chief Judge*, and BAZELON and BURGER, Circuit Judges.

WILBUR K. MILLER, *Chief Judge:* In their complaint, filed June 25, 1958, the appellants asked the United States District Court to declare unauthorized and illegal certain regulations and charter provisions for federal savings and loan associations promulgated by the appellees in 1949. They also asked the District Court to order that the 1949 regulations "generally be restored to the original regulations prevailing prior to March 7, 1949. . . . " In a pre-trial statement the parties agreed that the District Court first determined two legal issues, and that trial of the action would not be necessary unless both were decided in favor of the plaintiffs [appellants]. The issues were thus stated in an order of the District Court:

> "(a) The legality of the regulations (and charter provisions) promulgated and maintained by defendants as a Board since on or about March 7, 1949.
>
> "(b) The plaintiffs' legal standing to sue upon the basis of the defendants stipulating for purpose of determining this question that the business of banking may be conducted in Wisconsin by only such organizations, including plaintiffs, as are chartered to operate as banks, and upon the assumption for the purpose of determining this question that the factual allegations of the complaint are true. . . . "

Argument was heard on the agreed issues and thereafter, in a carefully considered opinion, reported in 190 F. Supp. 90 (1960), the trial judge held that the plaintiffs had standing to sue but that the challenged regulations and charter provisions are authorized and legal. Consequently, the complaint was dismissed.

This appeal by the Wisconsin banks and bankers brings before us only the holding that the regulations and charter provisions are valid, for "An appeal brings up for review only that which was decided adversely to the appellant." *Loudon v. Taxing District*, 104 U.S. 771, 774 (1881). As a cross appeal was not filed by the appellees, we cannot consider, and therefore express no opinion concerning, their argument that the District Court erred in holding the appellants had standing to sue. In the absence of a cross appeal, an "appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary. . . ." *United States v. American Ry. Exp. Co.*, 265 U.S. 425, 435 (1924). In *Morley Co. v. Maryland Casualty Co.*, 300 U.S. 185, 191 (1937), Mr. Justice Cardozo said this "rule is inveterate and certain."

The general theory of the complaint is that the challenged regulations and charter provisions are not in accord with Section 5 of the governing statute,[1] which provides that federal savings and loan associations "shall

---

[1] Section 5 of the Home Owners' Loan Act of 1933, as amended, 48 STAT. 132, 12 U.S.C. § 1464, is, pertinent part, as follows:

"(a) *Organization authorized.* In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

"(b) *Capital; deposits; certificates of indebtedness.* Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board."

raise their capital only in the form of payments on such shares as are authorized in their charter" and that "No deposits shall be accepted . . . " by them.

We recently held that a "share" in a federal savings and loan association is an investment, and is not equivalent to the deposit of money in a bank.[2] But the appellants here contend the 1949 regulations unlawfully permit federal savings and loan associations to raise capital by payments on "savings accounts" instead of on "shares" as the statute requires; that under this provision, the holder of a savings account in a federal savings and loan association is a creditor of the association just as a holder of a savings account in a bank is a creditor of the bank; and that, therefore, the provision authorizes the acceptance of deposits. They argue that, as a result of this and other related provisions of the 1949 regulations, federal savings and loan associations in Wisconsin are accepting deposits and so illegally engaging in the banking business in competition with the duly chartered banks of that state.

The appellants principally rely for support of their theory of illegality upon the 1949 regulation which defines "capital" as "the aggregate of the payments on savings accounts in a Federal association, plus earnings credited thereto, less lawful deductions therefrom." Whether this regulation is in accord with Section 5(b) of the Act depends upon the meaning of the term "savings account." If it means an account similar to a savings account in a bank with respect to which the bank is debtor to the depositor, the regulation is repugnant to Section 5(b), for two reasons: (a) payments on such savings accounts cannot be payments on "shares" of capital, as contem-

[2] Aetna Casualty and Surety Co. v. Porter, No. 16,066, decided this date.

plated by the statute, and (b) it violates the provision that "No deposits shall be accepted. . . ." On the other hand, if the term "savings accounts" was used to mean "shares" of an asscociation's capital, the regulation is in accord with Section 5(b).

The section of the 1949 regulations which defines capital in terms of payments on savings accounts is immediately followed by a section which defines the term "savings account" as "the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest." It seems quite clear, therefore, that the words "savings accounts" in the regulation defining "capital" have the same meaning as the word "shares" in the statutory provision governing the raising of capital.

It is suggested, however, that the term "savings accounts" has a special significance and is generally understood to describe such accounts in banks, with the result that its use in the regulation concerning the raising of capital permits the associations to accept deposits just as banks accept them. This suggestion assumes that the regulation defining "capital" as the "aggregate of payments on savings accounts" will be read without reference to the succeeding regulation which defines "savings account" as a share of capital. It also assumes that the term "savings account" has come to be restricted in its meaning to such an account in a bank, and may not be used as having any other significance. We do not agree to either assumption.

Other 1949 regulations and charter provisions are attacked as unauthorized and illegal, mainly on the theory that they tend to confirm the allegation that the associations have been authorized to accept deposits in competi-

tion with banking institutions. Among them are these provisions: (1) that which requires an association to obtain a signature card upon issuance of a savings account; (2) that which requires that a member be furnished with a copy of the charter and by-laws only upon request; (3) that which permits the withdrawal value of a savings account to be paid at any time; (4) that which requires that earnings, after payment of expenses and credits to reserves, be distributed semi-annually on savings accounts; (5) those which declare that "Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts and shall not become creditors," and that "All savings accounts shall be non-assessable;" and (6) that which prescribes the following form of subscription to capital by organizers of an association:

> "Having been given permission to organize a Federal association, the undersigned hereby subscribe for the amount of capital indicated below, and contract to pay into a savings account, upon the issuance of a charter, the amount of cash stated opposite their respective names below. We agree to cooperate in the development of such an association for the promotion of local savings and home-financing."

The mere statement of the regulations and charter provisions referred to in the preceding paragraph refutes the allegation of illegality with respect to them, particularly in view of the fact that we hold valid the regulations which define "capital" and "savings account." All the challenged provisions seem to us to be consistent with the statute, and to have been validly promulgated thereunder. As the District Court so held, its judgment will not be disturbed.

Affirmed.

BURGER, *Circuit Judge, concurring:* I concur fully with Chief Judge Miller's opinion. The essence of appellant's claim is that under the challenged regulations federal savings associations are permitted to look and act more and more like banks and should be deemed therefore to be engaged illegally in banking business. I am constrained to concede that these associations are indeed coming to be regarded by the public much as the equivalent of a bank. For a great number of people they are a substitute for a bank and in that sense compete directly with banks. But Congress was and is well aware of these factors.

We are not like a "super trade commission" charged with duties relating to advertising practices or even operating practices[1] of these associations. The superficial similarities of the associations to banks is admittedly very great. But we are concerned not with appearances but with legal realities; it is here that the differences are marked as Judge Miller has pointed out. The capital of a federal savings association is raised by payments on share interests. Calling them "payments" on "savings accounts" does not alter their legal status. That the payment may be regarded by the customer as a "deposit" or even called at times a deposit by the association does not make it a legal counterpart of a deposit in a bank. The "depositor" in a federal association is not a creditor as is the depositor in a bank. *Anderson Nat. Bank v. Luckett,* 321 U.S. 233, 241-2 (1944). He is an investor, as the very language of Section 5(b) of the Home Owners Loan Act describes the relationship. The owner of a "savings account" in the association is entitled to vote, in much the same way as a stockholder in a corporation, to elect the

---

[1] There is no claim that the associations are violating the regulations.

management. The Act under which they exist recites the congressional purpose which emphasizes the "investment" character of these shares and distinguishes them from the creditor debtor relationship between a bank account depositor and a bank. Congress authorized the Board to create these associations.

> In order to provide local mutual thrift institutions in which people may *invest* their funds *and* in order to provide for the financing of homes . . . 12 U.S.C. §1464(a). (Emphasis added.)

The contentions urged upon us by appellants are essentially economic arguments which might better be addressed to the Legislative Branch under whose authority these associations exist.

JUDGMENT IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil 1647-58

United States Court of Appeals
For the District of Columbia Circuit
Filed Jul 13 1961
Joseph W. Stewart, Clerk

No. 16,212 September Term, 1960

WISCONSIN BANKERS ASSOCIATION, ET AL., APPELLANTS

v.

ALBERT J. ROBERTSON, ET AL., COMPRISING THE FEDERAL HOME LOAN BANK BOARD, APPELLEES

Appeal from the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Chief Judge, and Bazelon and Burger, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment — of the District Court appealed from in this cause be, and it is hereby, affirmed.

For Chief Judge Wilbur K. Miller.

Dated: Jul 13 1961

Separate concurring opinion by Circuit Judge Burger.

ORDER DENYING PETITION FOR A REHEARING IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the District of Columbia Circuit

Filed Aug 10 1961

Joseph W. Stewart, Clerk

No. 16,212 September Term, 1960

WISCONSIN BANKERS ASSOCIATION, ET AL., APPELLANTS

v.

ALBERT J. ROBERTSON, ET AL., COMPRISING THE FEDERAL HOME LOAN BANK BOARD, APPELLEES

Before: Wilbur K. Miller, Chief Judge, Bazelon and Burger, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellants' petition for rehearing, it is

ORDERED by the court that the petition for rehearing is denied.

Per Curiam.

Dated: Aug 10 1961

APPENDIX B

Home Owners' Loan Act of 1933, Sections 5(a) and (b), 48 Stat. 132, U.S.C., Title 12, Sections 1464(a) and (b)

"1464. Federal Savings and Loan Associations — Organization Authorized

"(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.

Capital; deposits; certificates of indebtedness

"(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board."

Federal Deposit Insurance Act, Section 3(1), 64 Stat. 873, U.S.C., Title 12, Section 264(c)(12)

"Definitions

"(c) As used in this section —

* * *

(12) The term 'deposit' means the unpaid balance of money or its equivalent received by a bank in the usual course of business and for which it has given or is obligated to give credit to a commercial checking, savings, time or thrift account, or which is evidenced by its certificate of deposit, and trust funds held by such bank

whether retained or deposited in any department of such bank or deposited in another bank, together with such other obligations of a bank as the board of directors shall find and shall prescribe by its regulations to be deposit liabilities by general usage: *Provided,* That any obligation of a bank which is payable only at an office of the bank located outside the States of the United States, the District of Columbia, Hawaii, Alaska, Puerto Rico, and the Virgin Islands, shall not be a deposit for any of the purposes of this section or be included as a part of total deposits or of an insured deposit: *Provided further,* That any insured bank having its principal place of business in any of the States of the United States or in the District of Columbia which maintains a branch in Hawaii, Alaska, Puerto Rico, or the Virgin Islands may elect to exclude from insurance under this section its deposit obligations which are payable only at such branch, and upon so electing the insured bank with respect to such branch shall comply with the provisions of this section applicable to the termination of insurance by nonmember banks: *Provided further,* That the bank may elect to restore the insurance to such deposits at any time its capital stock is unimpaired."

SUMMARY COMPARISON OF PRINCIPAL CHANGES IN REGULATIONS AND CHARTER PROVISIONS OF FEDERAL SAVINGS & LOANS, EFFECTED BY FEDERAL HOME LOAN BANK BOARD IN 1949.

Subject Matter	*Before 1949 Change*	*After 1949 Change*
Share Capital	Paragraph 6 of Charter "K" provided — "Par. 6. — Share capital. — The share capital of the association shall consist of the aggregate of payments upon share accounts and dividends credited thereto less redemption and repurchase payments. * * * Share accounts of $100 or multiples thereof may be known as investment share accounts, consisting of full-paid income shares. All other share accounts shall be known as savings share accounts. Payments upon share accounts shall be called share payments. * * * "	Sections 141.3 and 141.4 of the Regulations provided — "Section 141.3 — Capital — The term 'capital' means the aggregate of the payments on *savings accounts* in a Federal association, plus earnings credited thereto, less lawful deductions therefrom. "Section 141.4 — Savings Account. — The term *'savings account'* means the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest." (Italics supplied)
Ownership of Share Accounts	Paragraph 7 of Charter "K" provided — "Par. 7. — Ownership of Share Accounts. — All share accounts shall be represented by share account books containing a certificate of membership and evidencing the participation value of the share account, except that investment share accounts may be represented by separate membership certificates. * * * "	Section 145.2 of the Regulations provided — "Sec. 145.2. Evidence of ownership — (a) Signature card. In connection with the issuance of a savings account a Federal association shall obtain a card containing the signature of the owner of such account * * * (b) Account books and certificates. A Federal association that has Charter N shall issue to each holder of its savings account an account book, or a separate certificate, evidencing the ownership of the account and the interest of the holder thereof in the capital of such Federal association; * * * "

SUMMARY COMPARISON OF PRINCIPAL CHANGES IN REGULATIONS AND CHARTER PROVISIONS OF FEDERAL SAVINGS & LOANS, EFFECTED BY FEDERAL HOME LOAN BANK BOARD IN 1949 (Continued)

Subject Matter	*Before 1949 Change*	*After 1949 Change*
Description of Dividends.	Paragraph 9 of Charter "K" provided — "Par. 9 — Reserves, Undivided Profits, and Dividends. — As of June 30 and December 31 of each year, after payment or provision for payment of all expenses and appropriate transfers to the reserve required below, and additional transfers to other reserve accounts, and provision for an undivided profits account, the board of directors shall declare as dividends the remainder of the net earnings of the association for the 6 months' period. All dividends shall be declared as of said dividend dates. * * * Profits to holders of share accounts shall be termed dividends (except bonus payments) and shall not be referred to as interest. * * *"	Paragraph 10 of Charter "N" provided — "Par. 10 — Reserves, surplus, and distribution of earnings. * * * As of June 30 and December 31 of each year, after payment or provision for payment of all expenses, credits to general reserves and such credits to surplus as the board of directors may determine, and provision for bonus on savings accounts as authorized by regulations made by the Federal Home Loan Bank Board, the board of directors of the association shall cause the remainder of the net earnings of the association for the 6 months' period to be distributed promptly on its savings accounts, ratably, as declared by the board of directors, to the withdrawal value thereof; * * *"
Repurchase of Shares.	Paragraph 12 of Charter "K" provided — "Par. 12 — Repurchase. — The association shall have the right to repurchase its share accounts at any time upon application therefor and to pay to the holders thereof the repurchase value thereof. Holders of share accounts shall have the right to file with the association their written applications to repurchase their share accounts, in part or in full, at any time. Upon filing of such written applications to repurchase, the association shall number and file the same in the order received * * *."	Paragraph 6 of Charter "N" provided — "Par. 6 — Withdrawals. — The association shall have the right to pay the withdrawal value of its savings accounts at any time upon application therefor and to pay the holders thereof the withdrawal value thereof. Upon receipt of a written request from any holder of a savings account of the association for the withdrawal from such account of all or any part of the withdrawal value thereof, the association shall within 30 days pay the amount requested; * * *"

SUMMARY COMPARISON OF PRINCIPAL CHANGES IN REGULATIONS AND CHARTER PROVISIONS OF FEDERAL SAVINGS & LOANS, EFFECTED BY FEDERAL HOME LOAN BANK BOARD IN 1949 (Continued)

Subject Matter	*Before 1949 Change*	*After 1949 Change*
Charter description of procedure for delayed payment of requests for repurchase.	Paragraph 12 of Charter "K" provided — "* * * *if any holder of a share account applies for the repurchase of more than $1,000 of his share account or accounts, he shall be paid $1,000 in order when reached, and his application shall be charged with such amount as paid and shall be renumbered and placed at the end of the list of applications to repurchase, and thereafter, upon again being reached, shall be paid a like amount, but not exceeding the value of his account, and until paid in full shall continue to be so paid, renumbered, and replaced at the end of the list. * * * *"	Paragraph 6 of Charter "N" provided — "* * * * if the association is unable to pay all withdrawals requested at the end of 30 days from the date of such requests, it shall then pay all withdrawals requested in accordance with such methods and procedures as to amounts and allotments of funds for such purposes as shall be provided in regulations made by the Home Loan Bank Board in effect at the date of the request for withdrawal."
Description as to status of unpaid requests for repurchase of shares.	Paragraph 12 of Charter "K" provided — "* * * * Holders of share accounts filing written application for repurchase shall remain holders of share accounts until paid and shall not become creditors. * * * *"	Paragraph 6 of Charter "N" provided — "* * * * Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts until paid and shall not become creditors."
Inclusion in charter provisions and regulations of the Code restriction preventing associations from representing that they will pay share capital on demand.		Section 163.6 of the Rules & Regulations for Insurance of Accounts provided —* "163.6. Demand Securities. No insured institution may issue any demand securities or advertise or represent that it will pay holders of its securities on demand."

*Note: The Rules & Regulations for Insurance of Accounts apply to all savings and loan associations insured by the Federal Savings & Loan Insurance Corporation, whether Federal or State-chartered.

SUMMARY COMPARISON OF PRINCIPAL CHANGES IN REGULATIONS AND CHARTER PROVISIONS OF FEDERAL SAVINGS & LOANS, EFFECTED BY FEDERAL HOME LOAN BANK BOARD IN 1949 (Continued)

Subject Matter	*Before 1949 Change*	*After 1949 Change*
Definition of the term "short-term".	Paragraph 10 of Charter "K" provided — "* * * a member desiring a short-term bonus shall agree to make regular monthly share payments of any specified amount on a savings share account until the participation value thereof shall equal 100 times the accrued monthly payment, * * *"	Section 141.5 of the Regulations provided— "Section 141.5 — Short-term savings account. — The term 'short-term savings account' means a savings account in a Federal association which is to be withdrawn in less than twenty-four months from the date on which such account is opened * * *."
Description of loss possibilities and limitations thereon.	Paragraph 6 of Charter "K" provided — "* * * All share accounts shall be nonassessable, and no holder thereof shall be responsible for any losses incurred by the association beyond the loss of the participation value of his share accounts at the time the loss is determined."	Paragraph 4 of Charter "N" provided — "* * * All savings accounts shall be nonassessable."
Form covering subscription to share capital.	Section 202.3 of original Regulations provided — "Having been given permission to organize a Federal savings and loan association, the undersigned hereby subscribe for the amount of share capital indicated below, and contract to pay, upon the issuance of a charter, the amount of cash stated opposite their respective names below. We agree to cooperate in the development of such an association for the promotion of local thrift and home financing."	Section 143.3 of the Regulations provided — "Having been given permission to organize a Federal association, the undersigned hereby subscribe for the amount of capital indicated below, and contract to pay into a savings account, upon the issuance of a charter, the amount of cash stated opposite their respective names below. We agree to cooperate in the development of such an association for the promotion of local savings and home-financing."

SUMMARY COMPARISON OF PRINCIPAL CHANGES IN REGULATIONS AND CHARTER PROVISIONS OF FEDERAL SAVINGS & LOANS, EFFECTED BY FEDERAL HOME LOAN BANK BOARD IN 1949 (Continued)

Subject Matter	*Before 1949 Change*	*After 1949 Change*
Requirement to deliver to each member a copy of charter and by-laws.	Section 202.9(c) of original Regulations provided — "* * * shall deliver to each member upon admission to membership a true copy of its charter and bylaws as amended. * * *" Paragraph 8 of Charter "K" provided —	Section 144.7 of the Regulations provided— "* * * shall deliver a copy of such charter and bylaws to any member upon request." Section 163.6 of the Rules and Regulations for Insurance of Accounts provided —
Restriction against accepting deposits.	"* * * The association shall not accept deposits from the public or issue any evidence of indebtedness except for advances. It shall not represent itself as a deposit institution."	"163.6. Demand Securities. No insured institution may issue any demand securities or advertise or represent that it will pay holders of its securities on demand." Similar restriction was not contained in Charter N or in the Rules and Regulations for the Federal Savings & Loan System.

NOV 15 1961
JOHN F. DAVIS, CLERK
SUPREME COURT, U.S.

No. 502

In the Supreme Court of the United States

OCTOBER TERM, 1961

WISCONSIN BANKERS ASSOCIATION ET AL., PETITIONERS

v.

ALBERT J. ROBERTSON ET AL., COMPRISING THE FEDERAL HOME LOAN BANK BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
WILLIAM H. ORRICK, Jr.,
Assistant Attorney General,
JOHN G. LAUGHLIN, Jr.,
STANLEY M. KOLBER,
Attorneys,
Department of Justice,
Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	10
Appendix	11

CITATIONS

Statutes:	
Home Owners Loan Act of 1933, Section 5, 48 Stat. 132 as amended, 12 U.S.C. 1464	2, 3, 4, 5, 9, 11
Subsection (a)	11
Subsection (b)	2, 8, 11
Federal Home Loan Bank Act of 1932, 47 Stat. 725, 12 U.S.C., 1421, et seq	2
38 U.S.C., 3101(a)	9
Regulations:	
Title 12, Code of Federal Regulations:	
Section 541.3	5, 11
Section 541.4	12
Section 541.5	5, 12
Section 543.3	5, 12
Section 544.1(a) par. 3(6)	6
Section 544.1(b) par. 3(6)	6
Section 544.1(a) par. 4	12
Section 544.1(b) par. 4	14
Section 544.1(a) par. 6	6, 7, 12
Section 544.1(b) par. 6	7, 13

Regulations—Continued
Title 12, Code of Federal Regulations—Con. Page
Section 544.1(a) par. 10 14
Section 544.1(b) par. 10 14
Section 545.1 5, 15
Section 545.2 15
Section 545.2(b) 6
Section 545.4(a) 6, 15
Miscellaneous:
78 Cong. Rec., Part 10 8
14 F.R. 1101 (1949) 3
14 F.R. 3980 (1949) 3
H. Rep. No. 55, 73d Cong., 1st Sess 8
S. Rep. No. 91, 73d Cong., 1st Sess 8

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 502

WISCONSIN BANKERS ASSOCIATION ET AL., PETITIONERS

v.

ALBERT J. ROBERTSON ET AL., COMPRISING THE FEDERAL HOME LOAN BANK BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Columbia (J.A. 80–88) [1] is reported at 190 F. Supp. 90. The opinions in the Court of Appeals for the District of Columbia Circuit (Pet. App. A 41–48) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on July 13, 1961. A timely petition for rehearing was denied on

[1] "J.A." refers to the joint appendix in the court of appeals, a part of the record before this Court.

August 10, 1961. The petition for certiorari was filed on October 17, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether regulations and charter provisions promulgated by the Federal Home Loan Bank Board, and maintained since 1949, which provide that federal savings and loan associations shall raise their capital by accepting payments on savings accounts representing share interests in the associations are in accord with Section 5(b) of the Home Owners Loan Act of 1933, as amended, and are, therefore, legal and valid.

STATUTES INVOLVED

Section 5 of the Home Owners Loan Act of 1933 and relevant regulations of the Federal Home Loan Bank Board are set forth in the Appendix, *infra,* pp. 11–15.

STATEMENT

Section 5 of the Home Owners Loan Act of 1933, App., *infra,* p. 11, authorized the organization of Federal Savings and Loan Associations "[i]n order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes * * *." For this purpose, the Federal Home Loan Bank Board [2] was authorized, under rules and regulations which it was to promulgate, to provide for the organization and operation of these institutions. Pursuant to this authority, the Board promulgated such regulations, which have been

[2] The Federal Home Loan Bank Act of 1932 created the Board, 47 Stat. 725, 12 U.S.C. 1421, *et seq.*

amended from time to time. (J.A. 61.) In particular, upon publication of notice of proposed rule making in the Federal Register on March 11, 1949 (14 F.R. 1101), these rules and regulations were amended in the Spring of 1949, and as amended were published in the Federal Register on July 16, 1949 (14 F.R. 3980).

Petitioners, the Wisconsin Bankers Association and several banks operating in Wisconsin, instituted this action against the Federal Home Loan Bank Board challenging, under Section 5 of the Act, the validity of these 1949 regulations which, in substance, provide that associations may raise their capital by payments into savings accounts. Petitioner sought a declaration of invalidity, a restoration of those regulations prevailing prior to the 1949 amendments, and other relief. (J.A. 4–25.)[3]

Initially, a motion for summary judgment made by respondents was denied on the ground that there were issues of fact which required resolution. (J.A. 2.) Pretrial proceedings were then held, at which the parties stipulated that disposition of the case could be expedited if two dispositive threshold questions should be first decided on stipulated facts. It was agreed that, in the event either issue was decided in favor of respondents, the action should be dismissed. (J.A. 67.) These issues concerned the legality of the

[3] Prior to the institution of suit, petitioner Wisconsin Bankers Association sought similar relief from the Board. (Ex. A to complaint, J.A. 26–48.) Respondents denied such relief in a resolution dated April 3, 1958. (Ex. B to complaint, J.A. 49–50.)

regulations and petitioners' standing to sue. The district court, upon the recommendation of the Pretrial Commissioner, ordered these two issues scheduled for hearing on briefs and oral arguments. (J.A. 78–79.) In a memorandum opinion the court held that petitioners had standing to maintain the action but dismissed the action upon the ground that the challenged regulations were valid. (J.A. 80–90.)

Petitioners then appealed to the Court of Appeals for the District of Columbia Circuit. (J.A. 91.) That court affirmed the judgment below, holding that the regulations were valid; it refused to consider the standing question "in the absence of a cross appeal." (Pet. App. 43.) [*]

ARGUMENT

Petitioners seek to invalidate long-standing regulations of the Federal Home Loan Bank Board on the ground that they permit federal savings and loan associations to raise capital by means of "deposits" which are specifically prohibited by Section 5 of the Home Owners Loan Act of 1933, App., *infra*, p. 11. This claim is based on the use in the regulations of the term "savings account" and the fact that "withdrawals" from these accounts are permitted. Both

[*] In view of the decision of the Court of Appeals on the merits, an appellate decision on the question of standing was not necessary to an affirmance of the judgment of the district court. We submit, however, that, contrary to the court below, a cross appeal was not necessary in order to put the question of standing to sue before the court. In the event that certiorari is granted, we reserve the right to urge, in the alternative in support of the judgment below, that petitioners lack standing to maintain this action.

courts below, after detailed consideration of pertinent regulations and Section 5, determined that the regulations are fully consistent with the statute. The decision is clearly correct and there is no occasion for further review by this Court.

1. Section 5 of the Act, *infra,* p. 11, provides that Federal associations "shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided", but that "no deposits shall be accepted." In implementation of this provision, the Board's regulations provide (12 C.F.R. 545.1) that the capital of an association:

> may be raised through payments on its savings accounts in the form of cash, or of property * * *.

Section 541.3 of 12 C.F.R. defines the capital as "the aggregate of the payments on savings accounts in a Federal association, plus earnings credited thereto, less lawful deductions therefrom." "Savings account" is defined as the "monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest." 12 C.F.R. 541.5. Thus, the regulations provide that an association raises capital by payment into a savings account, which is in itself a share in the association's capital, and that the holder of a savings account is a share-owner not a creditor.

This is borne out by the other regulations. Section 543.3 of 12 C.F.R. provides, as one of the organization

procedures, that "subscriptions to such Federal association's capital" is to be in the following form:

> Having been given permission to organize a Federal association, the undersigned hereby subscribe for the amount of capital indicated below, and contract to pay into a savings account, upon the issuance of a charter, the amount of cash stated opposite their respective names below. We agree to cooperate in the development of such an association for the promotion of local savings and home-financing. * * *

And charters prescribed by the regulations state that an association is empowered "[t]o raise its capital * * * by accepting payments on savings accounts representing share interests in the association." 12 C.F.R. 544.1(a), par. 3(6), 544.1(b), par. 3(6). Holders of savings accounts in an association so chartered must be issued (12 C.F.R. 545.2(b)):

> an account book, or a separate certificate, evidencing the ownership of the account and the interest of the holder thereof in the capital of such Federal association.

Similarly, although paragraph 6 of the association charters permits an association to pay the withdrawal value of a "savings account" at any time upon written request (12 C.F.R. 544.1(a) par. 6, (b) par. 6), when the association is unable to pay all withdrawal requests within a period of 30 days, the association then numbers and files all withdrawal requests in the order received and proceeds with payment as prescribed in 12 C.F.R. 545.4(a). App., *infra*, p. 15. See also 544.1(b), par. 6. Paragraph 6 of the pre-

scribed charters further provides that (12 C.F.R. 544.1(a) par. 6, 544.1(b) par. 6):

> Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts until paid *and shall not become creditors.* [Emphasis added.]

From these regulatory provisions it is clear that, whatever their similarities in name and practical operation, the savings accounts authorized by the regulations are not the legal counterpart of a deposit in a bank, and the relationship of holders of savings accounts to the associations is significantly different from the debtor-creditor relationship that exists between a depositor and a bank. Cf. Pet. App. 47.

In short, it is clear that the regulations as amended in 1949 effected no change either in the structure of federal savings and loan associations or in the relationships of the holders of "savings accounts" to the associations.

2. Petitioners' basic position apparently is that the use of the term "savings account," of itself, renders the regulations invalid under the Act. Such a position cannot be maintained. It is answered by the Congressional choice of title for these associations, *i.e., savings* and loans associations. And it is plainly rebutted by the legislative history of the Act, from which it is clear that the Congress was aware that these associations would compete for private savers' funds.[5] Unlike petitioners' depositors, however,

[5] "The bill also provides for the Board to charter Federal savings and loan associations in communities now insufficiently served by any institution or other lender on homes, so that

members of an association holding savings accounts pay for a share of capital, as Section 5(b) requires; and though they may withdraw their interests, they are subject to a waiting period, as well as a proration of funds in the event of an emergency. They are share-owners, not depositors.

3. The court below referred to its own decision in *Aetna Casualty and Surety Co.* v. *Porter*, No. 16,066, pending on petition for a writ of certiorari, No. 549 Misc., this Term. There, the question is whether accounts in savings and loan associations established by an incompetent veteran's committee with funds

---

provision may be made for the financing of homes in more than 1,500 counties in the United States now having no such facilities. *These associations are intended as permanent associations to promote the thrift of the people locally to finance their own homes and the homes of their neighbors.* To enable the Board to promote and develop these associations in areas not now served an appropriation of $250,000 is authorized. *To encourage the people to save their own funds for their own use in these associations*, provision is made for the Secretary of the Treasury to subscribe not exceeding $100,000 of preferred stock in such associations, provided the local public have actually put in in cash as much money as the Secretary of the Treasury subscribed, and an appropriation of $100,000,000 is authorized to enable the Secretary of the Treasury to take this stock. *This provision is intended to raise from private savers* and from possible borrowings from the Federal home-loan bank and from the money subscribed by the Secretary of the Treasury at least about $3 to loan on homes for each dollar put up by the United States." [Emphasis added.] [H. Rep. No. 55, 73d Cong., 1st Sess. 2. See also S. Rep. No. 91, 73d Cong., 1st Sess. 2.]

See also, the remarks of Representatives Thom and Hancock with regard to insurance of accounts in savings and loan associations, 78 Cong. Rec., Part 10, at 11209. See also the remarks of Representative Reilly, *id.* at 11195–96.

derived under veterans' benefit laws are exempt from the claims of creditors under 38 U.S.C. 3101(a). The Court of Appeals held that such accounts were not exempt. The United States has filed a memorandum as *amicus curiae* in No. 549 Misc., in support of the veteran's committee's petition for a writ of certiorari. The government's positions in No. 549 and this case are fully consistent.

In No. 549, we note that accounts in savings and loan associations have attributes both of an investment and an interest-bearing deposit, and we assert that the purposes of 38 U.S.C. 3101(a), "[t]o safeguard the estates of veterans derived from payments of pension," and "to make * * * benefit payments available for use in the current maintenance and support of the veteran, without interference by taxes or creditors," would be defeated by subjecting such accounts to the claims of creditors. In the present case, the issue is not the coverage of a liberal immunity provision like 38 U.S.C. 3101(a), but the reach of specific technical requirements pertaining to the raising of capital by federal savings and loan associations. Our position is that the challenged regulations create procedures and legal interests significantly different, in legal contemplation, from the type of deposits proscribed by Section 5 of the Home Owners Loan Act.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
JOHN C. LAUGHLIN, JR.,
STANLEY M. KOLBER,
Attorneys.

NOVEMBER 1961.

APPENDIX

Section 5 of the Home Owners Loan Act of 1933, 48 Stat. 132, as amended, 12 U.S.C. 1464, provides in relevant part as follows:

> *Federal Savings and Loan Associations—Organization authorized.*
>
> (a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be know as "Federal Savings and Loan Associations", and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States.
>
> *Capital; deposits; certificates of indebtedness.*
>
> (b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board.

The pertinent provisions of Title 12 of the Code of Federal Regulations are:

> 12 C.F.R. 541.3—*Capital.*—The term "capital" means the aggregate of the payments on savings accounts in a Federal association, plus earnings credited thereto, less lawful deductions therefrom.

12 C.F.R. 541.4—*Savings Account.*—The term "savings account" means the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest.

12 C.F.R. 541.5—*Short-term savings account.*—The term "short-term savings account" means a savings account in a Federal association which is to be withdrawn in less than twenty-four months from the date on which such account is opened * * *.

12 C.F.R. 543.3—Having been given permission to organize a Federal association, the undersigned hereby subscribe for the amount of capital indicated below, and contract to pay into a savings account, upon the issuance of a charter, the amount of cash stated opposite their respective names below. We agree to cooperate in the development of such an association for the promotion of local savings and home-financing.

12 C.F.R. 544.1(a), par. 4,544.1(b) par. 4—* * * All savings accounts shall be nonassessable.

12 C.F.R. 544.1(a), par. 6—*Withdrawals.*—The association shall have the right to pay the withdrawal value of its savings accounts at any time upon application therefor and to pay the holders thereof the withdrawal value thereof. Upon receipt of a written request from any holder of a savings account of the association for the withdrawal from such account of all or any part of the withdrawal value thereof, the association shall within 30 days pay the amount requested; *Provided*, That if the association is unable to pay all withdrawals requested at the end of 30 days from the date of such requests, it shall then pay all withdrawals requested in accordance with such methods and procedures as to amounts and allotments of funds for such purposes as shall be provided in regulations made by the Federal Home Loan Bank Board

in effect at the date of the request for withdrawal. Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts until paid and shall not become creditors.

12 C.F.R. 544.1(b), par. 6—*Withdrawals.*—The association shall have the right to pay the withdrawal value of its saving accounts at any time upon application therefor and to pay the holders thereof the withdrawal value thereof. Upon receipt of a written request from any holder of a savings account of the association for the withdrawal from such account of all or any part of the withdrawal value thereof, the association shall within 30 days pay the amount requested; *Provided,* That if the association is unable to pay all withdrawals requested at the end of 30 days from the date of such request, it shall then proceed in the following manner while any withdrawal request remains unpaid for more than 30 days:

Withdrawal requests shall be paid in the order received and if any holder of a savings account or accounts has requested the withdrawal of more than $1,000, he shall be paid $1,000 in order when reached and his withdrawal request shall be charged with such amount as paid and shall be renumbered and placed at the end of the list of withdrawal requests, and thereafter, upon again being reached shall be paid a like amount, but not exceeding the withdrawal value of his savings account, and until such withdrawal request shall have been paid in full, shall continue to be so paid, renumbered, and replaced at the end of the withdrawal requests on file: *Provided,* That when any such request is reached for payment, the association shall so advise the holder of such savings account by registered mail to his last address as recorded on the books of the association and, unless such holder shall apply in person or in writing for the pay-

ment of such withdrawal request within 30 days from the date of the mailing of such notice no payment on account of such withdrawal request shall be made and such request shall be cancelled: *And provided further,* That the board of directors shall have absolute right to pay on an equitable basis an amount not exceeding $200 to any holder of a savings account or accounts in any calendar month and without regard to any other provision of this section.

When the association is unable to pay all withdrawal requests within a period not exceeding 30 days from the date of receipt of written request therefor it shall allot to the payment of such requests the remainder of the association's receipts from all sources after deducting from total receipts appropriate amounts for expenses, required payments on indebtedness, earnings distributable in cash to holders of savings accounts, and a fund for general corporate purposes equivalent to not more than 20 percent of the association's receipts from holders of its savings accounts and from its borrowers. Holders of savings accounts for which application for withdrawal has been made shall remain holders of savings accounts until paid and shall not become creditors.

12 C.F.R. 544.1(a), par. 10, 544.1(b) par. 10—*Reserves, surplus, and distribution of earnings.*—* * * As of June 30 and December 31 of each year, after payment or provision for payment of all expenses, credits to general reserves and such credits to surplus as the board of directors may determine, and provision for bonus on savings accounts as authorized by regulations made by the Federal Home Loan Bank Board, the board of directors of the association shall cause the remainder of the net earnings of the association for the 6 months' period to be distributed promptly on its saving accounts, ratably, as declared by the board of directors, to the withdrawal value thereof; * * *

12 C.F.R. 545.1—*Savings accounts.*—The capital of a Federal association may be raised through payments on its savings accounts * * *.

12 C.F.R. 545.2—*Evidence of ownership.*—(a) *Signature card.* In connection with the issuance of a savings account a Federal association shall obtain a card containing the signature of the owner of such account * * * (b) *Account books and certificates.* A Federal association that has Charter N shall issue to each holder of its savings account an account book, or a separate certificate, evidencing the ownership of the account and the interest of the holder thereof in the capital of such Federal association; * * *.

12 C.F.R. 545.4(a)—Withdrawal requests shall be paid in the order received and if any holder of a savings account or accounts has requested the withdrawal of more than $1,000, he shall be paid $1,000 in order when reached and his withdrawal request shall be charged with such amount as paid and shall be renumbered and placed at the end of the list of withdrawal requests, and thereafter, upon again being reached, shall be paid a like amount, but not exceeding the withdrawal value of his savings account, and until such withdrawal request shall have been paid in full, shall continue to be so paid, renumbered, and replaced at the end of the withdrawal requests on file: *Provided,* That when any such request is reached for payment, such association shall so advise the holder of such savings account by registered mail to his last address as recorded on the books of the association and, unless such holder shall apply in person or in writing for the payment of such withdrawal request within 30 days from the date of the mailing of such notice, no payment on account of such withdrawal request shall be made and such request shall be cancelled: * * *.

U.S. GOVERNMENT PRINTING OFFICE: 1961

COURT, U. S.
NOV 24 19[illegible]
[illegible]NUS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 502

WISCONSIN BANKERS ASSOCIATION,
a Wisconsin corporation, and
THE AMERICAN EXCHANGE BANK,
a Wisconsin banking corporation, and
COMMERCIAL STATE BANK,
a Wisconsin banking corporation, and
GRAFTON STATE BANK,
a Wisconsin banking corporation, and
THE BANK OF COMMERCE,
a Wisconsin banking corporation, and
KENOSHA NATIONAL BANK,
a National banking association organized and existing under the laws of the United States of America,

Plaintiffs-Petitioners,

vs.

ALBERT J. ROBERTSON, IRA DIXON, and WILLIAM J. HALLAHAN, comprising the FEDERAL HOME LOAN BANK BOARD, Washington, D. C.,

Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PLAINTIFFS-PETITIONERS

HARVEY W. PETERS
1308 North Prospect Avenue
Milwaukee 2, Wisconsin
Counsel for Petitioners

Of Counsel:
PERCY W. PHILLIPS
H. STEWART DUNN, Jr.
JOHANNES R. KRAHMER
Southern Building
Washington 5, D. C.

INDEX

Page

Error in Question Presented 2

Distinction between a bank deposit and a savings account in a savings and loan 2

Reference to *Aetna Casualty and Surety Co. v. Porter,* No. 16,066, pending on Petition for a Writ of Certiorari 4

Illegality is not improved by age 6

Conclusion 6

CITATIONS

Aetna Casualty and Surety Co. v. Harry Clifford Porter, 185 Fed. Supp. 302 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 502

WISCONSIN BANKERS ASSOCIATION,
a Wisconsin corporation, and
THE AMERICAN EXCHANGE BANK,
a Wisconsin banking corporation, and
COMMERCIAL STATE BANK,
a Wisconsin banking corporation, and
GRAFTON STATE BANK,
a Wisconsin banking corporation, and
THE BANK OF COMMERCE,
a Wisconsin banking corporation, and
KENOSHA NATIONAL BANK,
a National banking association organized and existing under the laws of the United States of America,

Plaintiffs-Petitioners,

vs.

ALBERT J. ROBERTSON, IRA DIXON, and WILLIAM J. HALLAHAN, comprising the FEDERAL HOME LOAN BANK BOARD, Washington, D. C.,

Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS, WISCONSIN BANKERS ASSOCIATION, ET AL.

The Brief in Opposition filed by the respondents contains certain material errors as to warrant the petitioners filing this Reply Brief.

Error in Question Presented

The Brief in Opposition erroneously states the "Question Presented" (Page 2). In said Brief, the statement of the question presumes that savings accounts in Federal Savings and Loans represent share interests therein. There is no legal justification for the erroneous presumption. Nowhere in the challenged regulations is there the slightest indication that anyone making payments in a savings account in a Federal Savings and Loan Association acquires a share interest. Independently of a failure of the regulations to prescribe a share interest status is the equally important fact that the challenged regulations and charter provisions provide for a withdrawal of payments in a savings account. (Paragraph 6 of Charter "N", Page 54 of petitioners' Petition for a Writ of Certiorari). How can there be a withdrawal of payments, if such payments had in fact been converted into a share (property) interest? Respondents should at least admit that there is here a high element of confusion that should be eliminated through these questions being considered by The United States Supreme Court.

To the contrary, the original regulations and charter provisions prescribe share capital, and also provide for a repurchase of share accounts. (Paragraphs 6 and 12 of Charter "K", Pages 53 and 54 of petitioners' Petition for a Writ of Certiorari).

Distinction between a bank deposit and a savings account in a savings and loan

The Brief in Opposition also erroneously concludes (as did both the District Court and the Appeals Court) that the challenged regulations and charter provisions are

valid simply because there is a legal distinction between a deposit in a savings and loan and a deposit in a commercial bank. Petitioners feel free in asserting that a payment to a Federal Savings and Loan Association is a deposit somewhat contrary to the attempts of respondents to avoid the use of such term.

In *Aetna Casualty and Surety Co. v. Harry Clifford Porter*, 185 Fed. Supp. 302, the United States District Court for the District of Columbia on July 14, 1960 stated:

> "Moneys deposited in a building association by the committee of a veteran have not 'lost the quality of moneys', they have not been 'converted' into 'property'."

The District Court in said case concluded that since deposits in a Federal Savings and Loan Association had not been converted into property, the deposits were not subject to attachment. Needless to restate the simple legal precept that if the deposits had been converted into a share interest, there would legally result a conversion into property. Although the decision of the District Court in the *Aetna Casualty and Surety Co.* case was reversed by the Court of Appeals for the District of Columbia, this same case is now before the United States Supreme Court on a Petition for a Writ of Certiorari, with the United States Government filing a Memorandum as amicus curiae in support of a petition for a Writ of Certiorari filed by a Veteran's Committee. In the instant case, the Federal District Court for the District of Columbia regularly referred to payments in a Federal Savings and Loan Association as "deposits".

Needless to state, when Judges of a Federal District Court conclude that payments in a Federal Savings and Loan Association are deposits, there is reason to suggest

there must be some justification for such conclusions.* Considering now the alleged distinction between a deposit in a Federal Savings and Loan Association and a deposit in a bank, such distinction fails when one compares the deposit status of a person making payments to a savings and loan with that of a person making payments to a mutual savings bank. A deposit in a Federal Savings and Loan Association is legally identical to a deposit in a mutual savings bank.

Equally important, the avowed distinction takes no cognizance of the fact that if the legal distinction exists, it is unknown to the persons making the payments. As emphasized in the Petition for a Writ of Certiorari (Pages 26-28), persons making payments to Federal Savings and Loan Associations intend to make deposits, and this intent should not be ignored by the Courts in determining the legal status of the payments made to Federal Savings and Loan Associations.

Reference to *Aetna Casualty and Surety Co. v. Porter*, No. 16,066, pending on Petition for a Writ of Certiorari

The Brief in Opposition notes that the United States has filed a Memorandum as amicus curiae in the *Aetna Casualty and Surety Co. v. Porter* case, 549 Miscellaneous, in support of a Veteran's Committee Petition for a Writ of Certiorari, which seeks to have this Court determine that amounts in a Federal Savings and Loan Association savings account are not subject to attachment. Presumably, such Petition would proceed on the legal ground

*If the Federal Courts find it difficult to understand Federal Savings and Loan Associations' procedures, how can the unsophisticated public that has placed billions of dollars in these Associations be expected to know what they are doing? It is unnecessary to suggest that these misunderstandings have caused a tortious invasion of petitioners' bank charter property rights.

that amounts in a Federal Savings and Loan savings account have not been used to purchase anything. If the Wisconsin Bankers Association, et al are correct in their assumption that payments in a Federal Savings and Loan Association are mere deposits, then the position of the Veteran's Committee in the *Aetna Casualty and Surety Co. v. Porter* case is legally correct.

Petitioners would emphasize that here is a direct example as to the weird results flowing from the challenged regulations. In brief, a Veteran's Committee had presumed that a savings account in a savings and loan represented a deposit procedure. Even more important, two Federal District Court Judges for the District of Columbia had also so concluded.

As with any incorrect procedure (or with any falsehood), it is dangerous to follow a course of error. Eventually there is reached the stage reflected in the Brief in Opposition (Page 9) that the Government (which should be above reproach) is trying to argue that an account in a savings and loan has the attributes of both an investment and an interest bearing deposit. Apparently the respondents are asking the United States Supreme Court to legally determine that distinctions between dividends and interest, and distinctions between a deposit and a share (property) interest, not to mention a procedure completely opposed to the statute provided by Congress, are to be disregarded merely to support a highly erroneous (and illegal) procedure promulgated by a Federal administrative agency. It is unnecessary to suggest that such request made of the highest Court in the land is untenable.

Incidentally, one might inquire as to what has happened to the law provided by Congress. What reason is there for explaining away the statutory requirement that Federal Savings and Loans shall raise their capital only

by payments on shares as are authorized in their charters, and that no deposits shall be accepted?

Illegality is not improved by age

The argument in the Brief in Opposition starts out with the assertion that the challenged regulations and charter provisions are "long standing". Such contention disregards the fact that an entirely different (and valid) set of regulations and charter provisions were promulgated by the Federal Home Loan Bank Board for the period from the inception of the law until 1949, which is a longer period than the challenged regulations have been in existence.

Secondly, petitioners know of no rule of law whereunder completely invalid and illegal regulations and charter provisions can acquire a legal status through any factor of age.

Conclusion

Petitioners would assert that the Brief in Opposition filed in this proceeding of and by itself presents reasons why the United States Supreme Court must consider this issue, and once and for all resolve the questions placed before this Court by the Petition for a Writ of Certiorari.

Respectfully submitted,

HARVEY W. PETERS
1308 North Prospect Avenue
Milwaukee 2, Wisconsin
Counsel for Petitioners

Date: November 22, 1961

Of Counsel:

PERCY W. PHILLIPS
H. STEWART DUNN, JR.
JOHANNES R. KRAHMER

Office-Supreme Court, U.S.
FILED
JAN 5 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 502

WISCONSIN BANKERS ASSOCIATION,
a Wisconsin corporation, and
THE AMERICAN EXCHANGE BANK,
a Wisconsin banking corporation, and
COMMERCIAL STATE BANK,
a Wisconsin banking corporation, and
GRAFTON STATE BANK,
a Wisconsin banking corporation, and
THE BANK OF COMMERCE,
a Wisconsin banking corporation, and
KENOSHA NATIONAL BANK,
a National banking association organized and existing under the laws of the United States of America,

Plaintiffs-Petitioners,

vs.

ALBERT J. ROBERTSON, IRA DIXON, and WILLIAM J. HALLAHAN, comprising the FEDERAL HOME LOAN BANK BOARD, Washington, D. C.,

Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITION FOR REHEARING

HARVEY W. PETERS
1308 North Prospect Avenue
Milwaukee 2, Wisconsin
Counsel for Plaintiffs-Petitioners

INDEX

Page

Cases:

Harry Clifford Porter v. Aetna Casualty & Surety Company, No. 549 Misc. 2, 3, 4, 5

United States Statutes:

Home Owners' Loan Act of 1933, Section 5b, 48 Stat. 128, U.S.C.A., Title 12, Section 1464(b) 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 502

WISCONSIN BANKERS ASSOCIATION,
a Wisconsin corporation, and

THE AMERICAN EXCHANGE BANK,
a Wisconsin banking corporation, and

COMMERCIAL STATE BANK,
a Wisconsin banking corporation, and

GRAFTON STATE BANK,
a Wisconsin banking corporation, and

THE BANK OF COMMERCE,
a Wisconsin banking corporation, and

KENOSHA NATIONAL BANK,
a National banking association organized and existing under the laws of the United States of America,

Plaintiffs-Petitioners,

vs.

ALBERT J. ROBERTSON, IRA DIXON, and WILLIAM J. HALLAHAN, comprising the FEDERAL HOME LOAN BANK BOARD, Washington, D. C.,

Defendants-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITION FOR REHEARING

This Petition for Rehearing of the Order denying the Writ of Certiorari is filed in accordance with Rule 58(2) on ground that there are intervening circumstances of

substantial and controlling effect. These circumstances were not available to petitioners at time the original Petition for a Writ of Certiorari was filed. The full import thereof was learned by petitioners only after a Reply Brief had been filed with this Court by the petitioners, and after this Court granted certiorari in *Harry Clifford Porter v. Aetna Casualty & Surety Company*, No. 549 Misc. on December 11, 1961.

More particularly, the intervening circumstances consist of the perpetration of a deception upon this Court by the Solicitor General of the United States, whether deception was intended or otherwise. The deception consists of the Solicitor General taking two diametrically opposed positions as to an identical legal conclusion without so admitting to this Court.

Petitioners urge that without so intending the judgment in the Lower Court if allowed to stand will continue to contribute toward such deceptive result. Only through review by this Court can there be an affirmative determination as to whether said judgment is in fact entitled to respect and adherence by the United States, its agencies and counsel. Petitioners refuse to believe that there is the alternative that the United States may consider a judgment of a United States Court of Appeals to be scrupulously observed (and relied upon) by one executive department, but to be completely ignored as non-existent by another executive department. Even less acceptable to petitioners is the condition where the Solicitor General of the United States has filed a brief with this Court opposing the Petition for review of a judgment which this same Solicitor General has treated as non-existent in a brief (amicus curiae) filed with this Court in the other case pending for review. It is fantastic to believe that the Solicitor General should convince this Court by any

processes of this type. (Incidentally, the other petition for review has been granted by this Court.)

In the instant case petitioners contend that regulations and charter provisions promulgated and maintained since 1949 by the Federal Home Loan Bank Board for Federal Savings and Loan operation are contrary to the law enacted by Congress. Specifically, petitioners urge that the challenged regulations provide capital raising through a deposit accepting procedure instead of observing the statutory requirement that savings and loans raise capital only by sale of shares.

The United States Court of Appeals for the District of Columbia decided that the challenged regulations were valid and in accordance with the law in providing for savings and loans raising capital by accepting payments on shares. The Appeals Court determined that savings and loans were not accepting deposits. Commenting upon the challenged regulations the Appeals Court stated:

> "* * * It seems quite clear, therefore, that the words 'savings accounts' in the regulation defining 'capital' have the same meaning as the word 'shares' in the statutory provision governing the raising of capital."

The Solicitor General of the United States opposes review of the Appeals Court judgment. This can only mean that the Solicitor General not only believes but insists that a Federal savings and loan investment is a share in capital. Yet this same Solicitor General in a brief amicus curiae filed with this Court in the case of *Harry Clifford Porter v. Aetna Casualty & Surety Company*, No. 549 Misc., as to which certiorari was granted on December 11, 1961 by this Court, stated on behalf of the United States:

> "* * * We are advised by the Veterans Administration that, as of June 30, 1961, these beneficiaries had

> estates in excess of $750,169,000, nearly all of which was derived from veterans benefits. A substantial portion of these estates, as the present case would indicate, consists of funds on deposit in interest-bearing accounts in banks, trust companies, savings bank, building and loan associations and savings and loan associations. These interest-bearing accounts are not exclusively for purposes of investment, as the Court of Appeals has held, but also for the purpose of safekeeping and ready availability for rehabilitation, clothing, and medical emergencies. * * *"

In the quoted language the United States admits, if not insists, that investments in "building and loan associations and savings and loan associations" are "funds on deposit in interest-bearing accounts". This is precisely the contention of petitioners in the instant case in challenging the legality of savings and loan regulations and charter provisions promulgated and maintained since 1949 by the Federal Home Loan Bank Board.

The position of the United States as set forth in the language quoted is completely opposed to the Judgment of the Circuit Court of Appeals for the District of Columbia Circuit as to which petitioners seek review by grant of certiorari. The Appeals Court judgment determined that under the challenged regulations "savings accounts" were "shares" in savings and loan associations.

All conclusions as to clarity of the regulations made by the Appeals Court to the contrary notwithstanding, the Solicitor General of the United States has opposed the grant of certiorari in the instant case while at the same time urging upon this Court in the *Porter v. Aetna Casu-*

alty case that "savings accounts" in savings and loan associations are:

> "funds on deposit in interest-bearing accounts"
>
> or
>
> "These interest-bearing accounts (that) are not exclusively for purpose of investment."

By what stretch of imagination can "funds on deposit in interest-bearing accounts" or funds described as "interest-bearing accounts — not exclusively for purpose of investment" meet the capital raising prescriptions for savings and loans so clearly set forth in the law enacted by Congress:

> "Capital; deposits; certificates of indebtedness
>
> "(b) Such associations shall raise their capital only in the form of payments on such shares as are authorized in their charter, which shares may be retired as is therein provided. No deposits shall be accepted and no certificates of indebtedness shall be issued except for such borrowed money as may be authorized by regulations of the Board."
>
> (Home Owners' Loan Act of 1933, Section 5(b), 48 Stat. 132, U.S.C., Title 12, Section 1464(b)).

It is untenable that Federal administrative officers that are members of the Executive Department of the Government should so ignore both the law and the judgment of a Court of Appeals. Certainly, the Solicitor General should not place himself in the position of urging that a savings and loan investment is a "share" in the instant case, and then insist that the same investment is also a "fund on deposit in interest-bearing accounts", in the *Porter v. Aetna Casualty & Surety Company* case. A savings and loan investment is one or the other, but certainly it is not both.

Petitioners respectfully suggest to this Court that the judgment of the Court of Appeals for the District of Columbia should be reviewed by this Court granting the Petition for a Writ of Certiorari. Any judgment of an Appeals Court that has been subject to the treatment described herein by officers of the United States should be reviewed by this Court. Only by this Court promulgating its opinion in the instant case can there be a conclusive answer as to the validity of the challenged regulations.

CONCLUSION

Petitioners again urge upon this Court the need for reviewing the challenged regulations and charter provisions by a hearing of this case. Only a review by this Court can permit determining whether a savings and loan account, deposit, share, or whatever it may be called, actually reflects the capital raising procedure required under the law provided by Congress. Petitioners respectfully request this Court to grant the Petition for Rehearing, and to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

HARVEY W. PETERS
1308 North Prospect Avenue
Milwaukee 2, Wisconsin
Counsel for Plaintiffs-Petitioners

DATE: January 4, 1962.

CERTIFICATE OF COUNSEL

I, Harvey W. Peters, an attorney for the above-named plaintiffs-petitioners, Wisconsin Bankers Association, The American Exchange Bank, Commercial State Bank, Grafton State Bank, The Bank of Commerce, and Kenosha National Bank, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and the Petition is restricted to the grounds of the intervening circumstances presented in the Petition.

HARVEY W. PETERS
Counsel for Plaintiffs-Petitioners
Wisconsin Bankers Association
The American Exchange Bank
Commercial State Bank
Grafton State Bank
The Bank of Commerce
Kenosha National Bank